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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals, printed at XVI, 5819, is reported in 265 F. 2d 894. The opinion of the Court of Appeals denying the petition for rehearing, printed at XVI, 5836, is reported in 268 F. 2d 959.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (XVI, 5835). Rehearing was denied on August 12, 1959 (XVI, 5837). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). Certiorari was granted on December 7, 1959.

STATUTES INVOLVED

Mail Fraud Statute, 62 Stat. 763, as amended, 63 Stat. 94, 18 U.S.C., Sec. 1341:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Conspiracy Statute, 62 Stat. 701, 18 U.S.C. Sec. 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Rule 6 of the Federal Rules of Criminal Procedure.

* * *

"(d) *Who May be Present.* Attorneys for the government, the witness under examination, inter-

preters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

QUESTIONS PRESENTED

I.

Applicability of the Mail Fraud and Conspiracy Statutes

1. Whether the mail fraud statute applies and whether the trial court had jurisdiction to try the petitioners under the mail fraud and conspiracy statutes, where the case involved a state offense of embezzlement of local school funds by trustees of a local school district and others, and where the only

use of the mails charged in the indictment was the receipt by taxpayers of notices and information, the payment by taxpayers of school taxes, and the collection of a bill by a gasoline company.

II.

Denial of Motion for Access to Grand Jury Testimony

2. Whether the District Court erred in holding that it had no power to grant petitioners' motion for access to the grand jury testimony of a key government witness, and in failing to exercise its discretion.

3. Alternatively, whether, if the District Court did exercise its discretion, the denial of petitioners' motion for access to grand jury testimony constituted an abuse of discretion.

4. Whether defendants in a criminal case met this Court's requirement of showing a "particularized need" for access to relevant portions of a prosecution witness' testimony before the grand jury, where

(a) the witness, an accomplice and co-conspirator who played a vital role in the alleged scheme, was the principal prosecution witness; his testimony occupied 23 per cent of the record;

(b) the witness was shown to have made numerous statements, some under oath, including oral testimony, inconsistent with, and contradictory to, his testimony at the trial;

(c) the witness admitted that he had deliberately sworn falsely in affidavits to agents of the FBI relating to the petitioner Parr;

(d) the witness by his own testimony had engaged in fraud, forgery and embezzlement over a period of years;

(e) the witness had not been indicted but still faced the threat or possibility of prosecution for his complicity in the events involved in the present case and also for perjury and for giving false information to FBI agents if he did not testify favorably to the government;

(f) The Court of Appeals, upon reading the record, said that the jury could have found the witness' testimony "far from trustworthy".

5.[1] Whether petitioners' right of access to grand jury testimony is in any way affected by the Solicitor General's statement to this Court, contrary to the representations of the prosecutor in the trial court, that no transcript of the requested testimony was ever taken.

III.

Abuse of Prosecutorial Function

6. Whether (1) the prosecution's failure to record (assuming this to be true) the testimony of the witness Heras before the grand jury although the testimony of all witnesses except that of Heras and one other had been recorded; and its failure in both lower courts to disclose that it had failed to record the testimony of Heras; (2) its use before the grand jury and at the trial of a witness, Heras, whom it knew to have furnished false statements and to be unreliable; (3) its prosecution of petitioners in the Houston Divi-

[1] Questions 5 and 6 were not presented in the petition for certiorari. They necessarily became appropriate for this Court's consideration when the Solicitor General, in connection with his answer to the petition for certiorari, on December 3, 1959 stated to the Court that he had been advised that no transcript of the witness Heras' testimony had ever been made.

sion, far from their residence in the Corpus Christi Division, which it sought to make possible by the inverted device of accusing petitioners of having caused certain mailings in Houston by others not connected with the events in issue; and (4) its attempted use of federal jurisdiction to prosecute a purely local offense for which some of the petitioners were also prosecuted in the state courts: whether all of the foregoing constituted, in the circumstances, such an abuse of the government's prosecutorial function as to require this Court to exercise its supervisory functions so as to order dismissal of the indictment.

STATEMENT

I.

Summary of the Proceedings Below

Petitioners, all of whom were residents of the Corpus Christi division of the Southern District of Texas, were indicted on March 6, 1956, in the Houston Division of the Southern District on nineteen counts charging violation of the mail fraud statute, 18 U.S.C. 1341, and a twentieth count charging violation of the conspiracy statute, 18 U.S.C. 371 (I, 10-30).

The charges related to a scheme to embezzle and misappropriate funds of the Benavides Independent School District (BISD), located in the Corpus Christi Division. Venue was placed in Houston by allegations that each unlawful use of the mails took place in the Houston Division, and that petitioners "caused" such use.

Count 1 of the indictment set forth a general description of the alleged scheme to embezzle funds and then set forth a specific use of the mails constituting the

alleged crime. Each of the following substantive counts (2-19) incorporated the general allegations of Count 1 describing the embezzlement scheme, and alleged a separate use of the mails "caused" by petitioners as the crime with which petitioners were charged.

None of the nineteen substantive counts of the indictment charged that the defendants mailed or caused to be mailed any money, checks, vouchers, receipts, etc. representing specific funds which were embezzled or misappropriated, or any material of any nature designed to obtain specific funds which were fraudulently taken.[2] The crime charged in each of them was a use of the mails in the Houston Division by innocent persons, not connected with the scheme, as a normal part of their obligation to pay duly assessed taxes under Texas law and, in a minor instance, to collect a bill for gasoline supplied to the School District. In the first sixteen counts the crime charged was the mailing by taxpayers of checks in payment of tax assessments, and the receipt by those taxpayers of notices and information with respect to such assessments. The lawfulness of the assessments and notices was not challenged. The remaining three substantive counts charged a use of the mails by a supplier of gasoline in connection with bills owed to it by the School District. In each count, it was charged that petitioners caused the specific use of the mails by other persons in Houston.

[2] The Court of Appeals referred to the fact that reports were mailed to the state capital at Austin in order to obtain state funds. (XVI, 5822) It does not appear that the Court of Appeals relied on this. In any event, while this mailing was alleged to be part of the petitioners' scheme, it was not alleged as a violation of the mail fraud statute, and could not have been, since venue over this mailing was not in Houston.

Petitioners were put to trial on the present indictment four times. The first trial, held in 1956, ended in verdicts of acquittal as to certain petitioners with respect to some counts, and a mistrial as to the remaining counts for these petitioners and as to all counts with respect to all other petitioners. Two subsequent trials in March, 1957, ended in mistrials after the jury was impanelled. A fourth trial was commenced in May, 1957. It proved to be lengthy, the record reaching to almost 6,000 pages. Motions to dismiss the indictment and to change venue to a judicial division closer to petitioners' homes were denied (I, 310). This fourth trial ended in the conviction of all of the petitioners, although not all petitioners were convicted on every count. Defendant Parr was sentenced to ten years in prison and to pay a fine of $20,000; the other defendants received lesser sentences.[3]

On appeal, the Court of Appeals affirmed, holding that petitioners had been properly convicted under the mail fraud statute and the conspiracy statute and that the trial court properly denied a motion by petitioners

[3] The convictions and sentences of all petitioners were as follows:

Petitioner	Counts, findings of guilty	Sentence
Parr	1-20	5 years on each count, 1-10 concurrent, 11-20 concurrent but consecutive to 1-10, $1,000 cumulative fines on counts 1-20; totalling 10 years and $20,000.
Chapa	1-20	5 years on each count, all concurrent.
Donald	1-14, 17-20	4 years on each count, all concurrent.
Garza	all except 7	3 years on each count, all concurrent, suspended during 5-year probation period.
Garcia	4, 5, 8, 13-15, 17-20	3 years on each count, all concurrent, suspended during 5-year probation period.
Saenz	all except 7	3 years on each count, all concurrent.
Oscar Carillo, Sr.	1-20	4 years on each count, all concurrent.
Oliveira	20	2 years and a $7,000 fine, imprisonment suspended during 5-year probation period.
O. P. Carillo	20	2 years, suspended during 5-year probation period.
Texas State Bank	1-20	$100 cumulative fines on each count, a total of $2,000.
San Diego State Bank	1-3, 7, 10-12, 16, 20	$100 cumulative fines on each count, a total of $900.

for inspection of the grand jury testimony of three prosecution witnesses (XVI, 5819). Following this Court's decision, relative to the grand jury issue, in *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, the Court of Appeals entertained a motion for rehearing, which was denied on August 12, 1959 (XVI, 5837).

This Court granted certiorari on December 7, 1959 (XVI, 5838).

The petitioners Parr, Chapa and Donald were previously tried in state court on charges growing out of the same matters involved in the present case. Parr and Donald were found guilty, but their convictions were reversed. *Donald* v. *State*, 306 S.W. 2d 360 (Tex. Crim. 1957); *Parr* v. *State*, 307 S.W. 2d 94 (Tex. Crim. 1957). Petitioner Chapa was tried on two other indictments returned by the Duval County Grand Jury, both charging fraudulent conversion of funds of the Benavides Independent School District (Indictments #2951, 3096). On the first indictment, Chapa was acquitted. On the second indictment, Chapa was convicted, but his conviction was reversed. *Chapa* v. *State*, 301 S.W. 2d 127 (Tex. Crim. 1957).

II.

Facts With Respect to Offenses of Mail Fraud and Conspiracy

The Benavides Independent School District operated public schools in the towns of Benavides and Freer within the Corpus Christi Division of the Southern District of Texas (III, 720, 724). The District was governed by a board of seven trustees (III, 727). Pursuant to State law, it collected taxes from property owners based upon valuations fixed by a sepa-

rate Board of Equalization (X, 3380-3381). The total assessment was about $400,000 in 1949 and $650,000 in 1952 (X, 3377-3378). In addition, the District received a contribution from the State based upon the number of children attending the District's schools, averaging about $140,000 a year (G. Ex. 1-5).

Six of the individual petitioners were officially connected with the School District; three as trustees, two as officers, and one as attorney (III, 834, 840; V, 1210; VI, 2000). The remaining three individual petitioners were officials of the Texas State Bank, located at Alice, Texas, which was the depository of BISD funds (IV, 901-925). Petitioner Parr was president of both petitioner banks (IV, 999-1000; 1016) and, in addition, was said by a witness to have dominated the affairs of the BISD. (X, 3429-3430).

The scheme to defraud set forth in the indictment (Counts 1-19) and the evidence in support thereof was that over a period of about five years, the petitioners had embezzled about $200,000 in funds of the BISD by drawing checks to the order of fictitious persons or persons who had never rendered services, cashing those checks and appropriating the proceeds (X, 3349-3350). In addition (Counts 17-19), the government offered evidence to show that two petitioners charged to the BISD account relatively small amounts of gasoline used for their personal purposes.

In the charging paragraphs of the indictment, setting forth the alleged offenses committed, it was not alleged that petitioners mailed letters, sent checks, or engaged in any other acts in connection with or for the purpose of effecting the embezzlements or misappropriations. The use of the mails upon which the

principal counts of the indictment were based related to the payment of tax assessments by certain taxpayers located in Houston who owned property in the District. The taxpayers were required by Texas law to make the payments, and they would have been made irrespective of the scheme to embezzle. The petitioners, officials of the BISD, were required by law to send out the notices and make the assessments, and they were in lawful custody of the funds. The payments involved in the alleged use of the mails were duly credited to the taxpayers on the books of BISD; and the proceeds merely formed a part of the general funds of the BISD from which petitioners allegedly misappropriated money. (Counts 1-16).

Counts 17-19 of the indictment similarly charged that the petitioners caused Conoco, a company operating filling stations, to deposit in the mails in Houston invoices for gasoline charged to the BISD and to take from the mails the BISD's check in payment therefor. These invoices included bills for some gasoline that some of the petitioners used for personal purposes. This elaborate and circuitous charge is based upon the fact that one or two petitioners drove up to a local Conoco gasoline station, obtained gasoline and supplies and charged these items on a BISD credit card (V, 1454-1459). Thereafter, in ordinary course, Conoco's office in Houston sent its invoice to BISD for all gasoline charged to BISD, and BISD mailed its check in payment (V, 1423-1430).

Count 20 of the indictment charged a conspiracy to commit "the offenses against the laws of the United States which are fully described and set out in the *first count* of the indictment . . ." (Emphasis supplied), and then proceeded to enumerate certain overt acts.

It is significant that this charge was limited to the "first count" of the indictment. That count sets forth the embezzlement scheme, and subsequent counts merely incorporate the description of the scheme by reference. Count 1 charges as a crime only the single fact that petitioners caused the Humble Oil and Refining Company to take from the mails in Houston a single notice relating to its tax assessment. It is obvious that the draftsmen of the indictment had in mind, in the conspiracy count, the real thrust of the indictment: that is, a conspiracy to embezzle (which is not a federal crime), and not the artificially appended and unrelated charge involving the use of the mails. This dramatizes the basic defect of the indictment: the lack of relationship between the alleged *scheme* and the *offenses* with which petitioners were charged.

The indictment, of course, does not charge any of the acts of embezzlement or misappropriation as a federal crime. It does not charge that there was any use of the mails in connection with or incidental to the alleged acts of embezzlement. The only uses of the mails charged as offenses relate to the lawful collection of taxes or payment of bills in ordinary course. Each of the violations of law charged by the indictment depends entirely and exclusively upon uses of the mail which had nothing whatever to do with the manner, method, or mechanics of the alleged misappropriation of funds. Instead, the crimes alleged are uses of the mail by taxpayers to ascertain and pay their taxes to the School District (Counts 1-16), and by a gasoline filling station company in the course of transmitting a bill to the BISD and collecting it (Counts 17-19), which included

a relatively minor charge for gasoline which was used for the personal benefit of one or two of the petitioners, and a conspiracy count (Count 20).

In short, as we shall show, the indictment does not charge as offenses any materials mailed or caused to be mailed by petitioners as "an incident" of the alleged scheme. The charged mailings were independent acts —independent of and not incidental to the embezzlements and the misuse of BISD gasoline.

For the convenience of the Court, petitioners have listed in an Appendix the exhibits to the substantive counts of the indictment.

III.

Facts With Respect to the Motion for Access to Grand Jury Testimony

Diego Heras, who was named as a co-conspirator in the indictment (I, 27) and was an accomplice under the Court's charge, (XV, 5493) was the key prosecution witness.[4] His testimony covered 1,008 printed pages, or approximately 23 per cent of the record. He testified, *inter alia*, that he worked for the BISD for over 20 years (VII, 2320) and was acting Secretary of the District or Deputy Tax Assessor-Collector during most of the period of the alleged scheme (VII, 2321), that he prepared checks, including checks to the order of fictitious persons (VII, 2328-2329), that he cashed such fictitious checks (VII, 2331-2334), that he forged endorsements (VII, 2345), and that he gave the proceeds to petitioner Parr (VII, 2333). His testimony, if believed, furnished most of the factual elements of the offense.

[4] At the trial, petitioners also sought access to the grand jury testimony of two other prosecution witnesses, William M. Benson and Mrs. Edna Fitch. Only Heras' testimony is now sought, because of his critical importance.

Heras had previously testified at the first trial of this case in November and December 1956; in at least two state court trials involving the petitioners Parr and Donald in 1956 and 1957 (IX, 3005); in 1953 and 1954 before the Duval County grand jury (IX, 2924-2925) investigating the Benavides Independent School District and petitioners; and before two federal grand juries, including the one which returned the present indictment. Heras had also made numerous statements, some under oath, to investigating officers (VIII, 2429-2437).

It was proved that Heras had previously lied under oath with respect to the subject matter of his testimony at the trial and particularly concerning petitioner George Parr. Thus in April 1953 he had made a sworn statment to the FBI concerning the petitioner George Parr (IX, 3173), and two days later made a second sworn statement to the FBI declaring that the statements in the earlier affidavit "were false and untrue and I knew them to be untrue at the time". (IX, 3178). At the trial Heras switched again, saying that his earlier statement was closer to the truth (IX, 3187).

On cross-examination it was also demonstrated that there were numerous inconsistencies between Heras' testimony at the trial and so much of his previous statements and testimony as was known to the defense (E.g., VIII, 2511, 2558-2662; 2526-2537).

The Court of Appeals itself noted that "Some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits". (XVI, 5830). And the Court of Appeals commented, "The jury could have be-

lieved both that Heras had feathered his own nest at the expense of the board and that his testimony was far from trustworthy". (XVI, 5823). Heras was also subject to indictment, in case he failed to cooperate with the prosecution, for his participation in the BISD affair and also for having furnished a false affidavit to the FBI.

At the beginning of Heras' direct examination, the defense made a request, in general terms, for permission to inspect prior statements and testimony by Heras. The defense said it was seeking all material in the control or possession of the government "by this witness touching the subject matter of his testimony at this trial, so that we may ask for an order of the Court to produce for our inspection those relevant statements or reports." (VII, 2284-2285).

At the suggestion of the prosecution, a ruling on this request was deferred until the end of Heras' direct examination (VII, 2289-2290 and 2318). At the same time, the defense was able to obtain from the prosecution, pursuant to *Jencks* v. *United States*, 353 U.S. 657, various statements of Heras other than his testimony before the grand jury (VIII, 2429-2437).

Mr. Wilkey, the prosecutor,[5] expressly stated to the trial judge on three occasions that he did have a transcript of Heras' testimony before the federal grand jury which had returned the indictment against the petitioners in his possession (VII, 2313, VIII, 2442), and defense counsel then requested the Court to grant access to such testimony (VIII, 2441-2442; X, 3335-3336). The colloquy between defense counsel, the

[5] Malcolm R. Wilkey, now Assistant Attorney General of the United States.

United States Attorney and the court with respect to the defense request for access to Heras' grand jury testimony was as follows (VIII, 2441-2442):

> "Mr. Foreman: May it please the Court, the first further request we have is for the testimony of this witness before the Federal grand jury.
>
> "Mr. Wilkey: Your Honor, it is the Government's position that that is not covered by the Jencks opinion.
>
> "The Court: That is the opinion of the Court. I don't know what the Supreme Court may say about it. Has the Supreme Court said anything about it?
>
> "Mr. Foreman: Not that I know of. I was—
>
> "The Court: This Court will deny that request.
>
> "Mr. Foreman: We would like to establish the fact that he does have this testimony and has it in the courtroom and had it prior to the time the trial started.
>
> "Mr. Wilkey: I do not have it in the courtroom, and it is in my office, and until it is—
>
> "The Court: It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it."[6]

Still later, near the end of the direct examination of another witness, Benson, the question of access to grand jury minutes was again raised and the trial judge refused to change his ruling. (X, 3335-3336).

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[6] The petitioners' motion for access to Heras' testimony and the trial court's ruling were made after this Court decided *Jencks* v. *United States*, 353 U.S. 657, and before the decision in *United States* v. *Procter & Gamble*, 356 U.S. 677, and the enactment of 18 U.S.C. § 3500.

IV.

Facts With Respect to Existence of Grand Jury Transcript

In light of the Solicitor General's statement to this Court that his inquiry has disclosed that no transcript of Heras' grand jury testimony was ever taken, petitioners set forth here the facts with respect to this matter as they appear from the record and from such statement.

The petitioners' claim for access to the transcript of Heras' testimony was pressed and contested in the trial court, argued to the Court of Appeals and urged again on petition for rehearing, and taken to this Court by petition for certiorari. The government filed its brief in opposition largely addressed to the grand jury question, and petitioners filed a reply to which the government also responded, devoted exclusively to that question. It was only thereafter that the Solicitor General discovered and disclosed to counsel for petitioners and this Court the astounding fact, as represented, that Heras had been examined by the grand jury on the last day of its consideration of this matter, and although the testimony of witnesses who appeared on previous days was recorded, Heras' testimony was not recorded.

To support his representation, the Solicitor General cited (1) the failure of the "grand jury assignment book" to record the presence of a court reporter on the day when Heras testified (the day the indictment was returned), and (2) the fact that the court reporter "recalls that he did not record the grand jury testimony of either Heras or the other witness on that day, although he did record the testimony of other witnesses before the grand jury". Further Supplemental Memorandum for the United States, p. 2. We fail to understand why the Solicitor General's memorandum makes

no reference to the recollection of counsel who were present during the grand jury session at which Heras testified, or why the memorandum includes no statement as to whether any notes or memoranda were made of Heras' testimony.

The record shows that Assistant Attorney General Wilkey, who was the United States Attorney for the Southern District of Texas at the time of these proceedings, and who participated in the presentation of evidence to the grand jury, directed the prosecution at the trial and argued the case in the Court of Appeals, stated on three separate occasions that he did have a transcript of Heras' grand jury testimony in his possession. The first time was in response to a direct question by Mr. Foreman, the defense counsel (VII, 2313). The second time, quoted above, was during the colloquy which ended with the denial of Mr. Foreman's request (VIII, 2441). The third statement by Mr. Wilkey, quoted in Petitioners' Reply to Respondent's Second Supplemental Memorandum, occurred when the court, on its own initiative, made an inquiry as to the existence of a transcript of the grand jury testimony of Heras (X, 3335-3336). With respect to these representations, the Solicitor General advised this Court that Mr. Wilkey, when he told the trial court that he did have a transcript, "was in error".

SUMMARY OF ARGUMENT

This case involves an effort by federal authorities to secure the conviction in federal court of a prominent local political figure and his associates for activities of an essentially local character. This effort has brought forth a distorted and untenable use of federal criminal statutes, the obtaining of an indictment under improper

circumstances, and the introduction of tainted testimony without adequate opportunity for impeachment.

1. The uses of the mails charged as offenses in the indictment are not violations of the mail fraud statute. The scheme alleged was that the petitioners, by a variety of methods, converted to their own use funds of the Benavides Independent School District. This constituted an offense under state law. The entire scheme took place in the Corpus Christi Division of the Southern District. There is a great gulf between the scheme alleged and the mailings charged as offenses in the indictment. All of the mailings said to violate the mail fraud statute took place not in the Corpus Christi Division but the Houston Division, and consisted of innocent actions by innocent persons incident, not to the scheme of embezzlement, but to the duty to pay taxes and the collection of trade accounts. They were not incident to the scheme, but would have occurred whether or not the scheme existed. These mailings are not offenses against the United States, and the petitioners should either be acquitted or the indictment should be dismissed for failure to allege a crime against the United States.

2. Petitioners are entitled to access to the grand jury testimony of the key government witness Heras. Petitioners made an overwhelming showing of likelihood that the grand jury testimony of Heras would be materially inconsistent with his trial testimony. Thus petitioners met this Court's requirement for showing a "particularized need" for the grand jury testimony. The trial court's ruling represented either a complete failure to exercise discretion or an abuse of discretion in refusing access despite the showing of particularized need.

The statement by the Solicitor General that no transcript of Heras' testimony is in existence cannot affect petitioners' rights. The assertion is by itself insufficient to establish whether or not Heras' testimony was recorded, whether a transcript does exist or did exist, or, alternatively, whether notes were taken or memoranda made. The Solicitor General's statement cannot foreclose an inquiry into the strange circumstances of this matter. In any event, the trial court is empowered to grant access to the grand jury testimony by other means such as the production of notes or memoranda relating to Heras' grand jury testimony, the examination of Heras on the subject and the direct testimony of the prosecutor and the grand jurors themselves.

3. This case presents a record of abuse by the government of its prosecutorial function: (1) Failure to record the grand jury testimony of the witness Heras was an abuse of the powers of the Federal Government as prosecutor. 'Other witnesses' testimony was transcribed. Heras was a witness whose unreliability with respect to these petitioners and these events, and propensity for falsehood, were known to the prosecutors. (2) The government should not have presented Heras' testimony to the grand jury or at trial. (3) The defense of this case and the prosecution of the appeals herein have been embarrassed by the facts now asserted for the first time by the Solicitor General: that no transcript ever existed despite three statements in the trial court to the contrary by the government's counsel (now its Assistant Attorney General), and despite the litigation of the question on a contrary assumption in the trial court, the Court of Appeals, upon rehearing in that court, and in the initial papers filed in this Court; (4) the government should not have attempted to

use the mail fraud statute to punish local crime; (5) The prosecution should not have engaged in the present tortuous attempt to place venue in Houston, and the resulting offenses charged to have occurred in Houston do not constitute crimes. When these factors are considered in the context of this case, we submit that the Court should exercise its supervisory powers to require dismissal of the indictment.

ARGUMENT

This case demonstrates anew that overzealous efforts to bring about a conviction lead to distorted use of statutes, irregular and unfair procedures and, ultimately, to a denial of justice. According to the testimony in this case, petitioner Parr, a prominent local politician in southeastern Texas, and his associates were guilty of the mismanagement of a local School District and the misuse of the District's funds. Despite the prosecution of petitioners in the state courts it was determined to try the petitioners in federal court at a point distant from their residence. To this end an indictment was so drawn as to place venue far from the site of the offenses and the residence of petitioners.

It is our position that this indictment does not allege and the evidence does not establish offenses against the United States under the mail fraud statute; that petitioners were erroneously denied an opportunity to impeach a very important government witness of known unreliability who testified under circumstances which were an invitation to perjury; and that the case presents an example of abuse of the power of prosecution which requires dismissal of the indictment.

I.

THE UNITED STATES FAILED TO ALLEGE OR PROVE A VIOLATION OF THE MAIL FRAUD OR CONSPIRACY STATUTES

A. The Mailings Were Not Incident to the Alleged Scheme

The mail fraud statute, 18 U.S.C., Section 1341, contains three essential elements. It makes it a federal offense for any person (1) having devised or intending to devise any scheme to defraud; (2) to place anything in the mail, take anything from the mail, or knowingly cause anything to be delivered by mail in accordance with the direction thereon; (3) for the purpose of executing such a scheme.

In *Pereira* v. *United States*, 347 U.S. 1, 8, this Court recently restated these elements. It pointed out that the scheme need not contemplate the use of the mails as an essential element, but that the mailing must be "incident to an essential part of the scheme", and it must have been "caused" by the person charged with its use.

A comparison of *Pereira* with the present case sharply and clearly demonstrates our point that the present indictment does not charge and the record does not establish an offense within the mail fraud statute.

In *Pereira*, the defendants induced Mrs. Joyce to agree to "invest" $35,000 in a non-existent hotel venture. To carry this out, Mrs. Joyce agreed with Pereira that she would cause her brokers in Los Angeles to sell some of her securities and remit the $35,000 to her in El Paso, Texas. She received the check from her brokers, drawn on a Los Angeles bank. She turned the check over to Pereira who deposited it for collection in a bank in El Paso. The

El Paso bank cleared the check with the Los Angeles bank, and a cashier's check for the proceeds was turned over to Pereira.

It will be noted that the very object of the swindle—the check for the money which was misappropriated—was the object transported by mail; and it was mailed because of, and as an incident to, an integral part of the scheme to defraud.

In the present case, the objects which were mailed were *not* the subject of the fraud. The money embezzled was from the general funds of the BISD. The assessment notices and the checks in payment of taxes had nothing to do with enabling the petitioners to misappropriate funds or with concealment of the misappropriations. Petitioner's scheme to embezzle was not the reason why the assessments were mailed and taxes paid. Indeed, the assessments and payments were "caused" not by the petitioners, but by the laws of Texas. The taxpayers were paying their taxes not because of petitioners' scheme, but because the law required them to do so.

The gasoline diverted to personal use came from the tanks of the local dealer; its procurement was not authorized by mail or implemented, effected or assisted by the mailing charged as an offense. The mailings were merely invoices mailed by Conoco to BISD, covering official gasoline as well as the gasoline used for personal purposes, and the checks of BISD to pay for the invoices.

In this connection, it is significant that the mail fraud statute does not make it a crime to cause another to use the mails, and thus the indictment does not

allege an offense in the terms of the statute. The Court of Appeals acknowledged (XVI, 5829) that the indictment could be sustained, if at all, only on the basis of the principals statute, 18 U.S.C. § 2(b).[7] But that statute plainly adds nothing to the validity of the indictment. By its terms, it covers only the case of a person who commits a crime by using an innocent instrumentality or agent instead of doing the act directly. Here it cannot be said that those who used the mail in Houston were the agents or instrumentalities of petitioners or that such use of the mail could have been performed by petitioners directly.

We know of no case in which facts similar to the present have been held to justify a prosecution under the mail fraud statute. Essentially, petitioners' position is that the mails were used in the normal process of tax collection and the payment of bills. The mailings were in no way incident or related to the scheme. Accordingly, petitioners may not be charged with using the mail or causing the mail to be used "for the purpose of executing [their] scheme", as the statute requires.

If the prosecution's position is correct, federal criminal jurisdiction has been explosively expanded. For example: a clerk in a local grocery store who mails out bills to customers dips into the cash drawer and abstracts a few dollars each week for himself. He may be prosecuted in the federal courts. Any traveling salesman, door-to-door canvasser or truck driver

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[7] *Principals Statute*, 62 Stat. 684, as amended, 65 Stat. 717, 18 U.S.C. Sec. 2:

* * *

"(b) Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

who buys gasoline on his employer's credit card and improperly uses some of it for his personal reasons, any official or employee who improperly charges a cocktail on his firm's credit card, violates the federal mail fraud statute on the theory of this case because the bill is sent to his employer by mail.

Surely, we submit, this is not the purpose or intent of the mail fraud statute, however generously it may be viewed.

This Court has recognized the importance of a careful and circumscribed application of the mail fraud statute because of its critical role in demarking state and federal functions. It is only when the offense is an offense *against the United States*—that is, an unlawful use of the federal mail facilities—that federal jurisdiction may be invoked. Federal jurisdiction does not attach merely because the mails are used. The use of the mails must be "incident to an essential part of the scheme". *Pereira* v. *United States, supra.* Otherwise, the mail fraud statute will become the vehicle of federal encroachment upon local criminal jurisdiction to a degree that will be destructive of state responsibility in the field.[8] As this Court held in *Kann* v. *United States*, 323 U.S. 88, 95:

> "... The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The crucial fact in the present case is that the mailings had nothing to do with the fraudulent scheme.

[8] *Cf.* Mr. Justice Black's dissent in *Rutkin* v. *United States*, 343 U.S. 130, 141-143.

The scheme would have been effected even if there had been no mailing whatever. The alleged embezzlements were funds of the BISD, regardless of source. One or two of the petitioners would have made occasional use of the BISD gasoline credit card regardless of whether the bills were sent by mail. They may have been committing crimes against the State of Texas; but they were not violating, misusing or causing misuse of the federal mails. The use of the mails had no relationship to executing or concealing the scheme or artifice, or attempting to do so; nor did it have any relationship to the consummation of the fraud.

No mail fraud case we have found comes close to upholding the present indictment. In every case we have found, the use of the mails would not have occurred *but for* the scheme. Here the use of the mails would have taken place whether or not the scheme had been in existence; and the execution of the scheme did not depend upon, nor was it implemented by, the use of the mails.

United States v. *Beall*, 126 F. Supp. 363 (N.D. Calif. 1954) presents, we believe, a factual situation closely parallel to that of the present case. The defendant was treasurer of the Infantile Paralysis Foundation. In that capacity, he received through the mail checks intended as contributions to the Foundation. Some of these he converted to his own use. He was charged with a violation of the mail fraud statute in that he "took from" the mail letters addressed to the Foundation, allegedly in execution of his fraudulent scheme. The trial court dismissed the mail fraud charges. It held that "the alleged scheme to defraud is simply a plan to embezzle." 126 F. Supp. 363-365.

The present case presents the same situation. The use of the mails here had nothing to do with any scheme of embezzlement. All that was alleged or proved is that the mails were used, but not as an incident of effectuating or concealing the scheme. The mailings would have occurred whether or not the scheme existed.

The *Beall* case rests on the authority of *Kann* v. *United States*, 323 U.S. 88, quoted above, and such cases as *McLendon* v. *United States*, 2 F. 2d 660, 661 (6th Cir. 1924) and *Richardson* v. *United States*, 150 F. 2d 58 (6th Cir. 1945). In *Richardson*, the Court of Appeals said (150 F. 2d 58, 63):

> "We see no connection whatever between the mailing of the letter and the scheme to defraud charged in the indictment. It had no purpose to prevent discovery or to contribute to any subsequent fraud. Cf. Bogy v. United States, supra. The mail fraud statute, Title 18, U.S.C., § 338, 18 U.S.C.A. § 338, covers only such letters as are mailed or caused to be mailed for the purpose of executing or concealing the scheme or artifice, or attempting to do so. The letter must have some relation to and be a step in the consummation, or attempted consummation, of the fraud."

Kann v. *United States*, 323 U.S. 88, involved a scheme to defraud a corporation by diverting profits to another corporation as "subcontractor", paying large bonuses to certain executives for work not performed, and obtaining for the defendants money due to the corporation. The use of the mails involved the clearing of checks (a) in payment of the fraudulent bonuses and (b) in payment to defendants for property belonging to the corporation which defendants represented to be their own. A majority of the Court held that the mail fraud statute was not applicable because the

scheme was complete before the mailings took place. But even the minority's view is consistent with our position, because the mailings involved checks drawn as payment for the specific frauds and representing the money stolen. They would not have occurred but for the scheme, and they were used to effectuate the fraud.

The same is true of earlier mail fraud cases which have come before the Court. For example, in *United States* v. *Kenofskey*, 243 U.S. 440, the defendant insurance agent transmitted a false claim to his local office which mailed the claim to the home office; thus the thing caused to be mailed was the subject of the fraud. And in *United States* v. *Young*, 232 U.S. 155, the things mailed were false statements designed to induce a third party to loan money in reliance thereon.

None of the lower court decisions cited by the United States (Brief in Opposition, pp. 24-25) comes close to the case here. In *Weiss* v. *United States*, 120 F. 2d 472 (5th Cir. 1941), *cert. denied*, 314 U.S. 687, the letters mailed were in connection with the raising and padding of a fraudulent construction bid. In *Steiner* v. *United States*, 134 F. 2d 931 (5th Cir. 1943), *cert. denied*, 319 U.S. 774, an attorney who undertook to get clients' tax assessments fraudulently reduced billed his clients through the mail for these services; thus the mailings were of the essence—the object of the fraud. In *Shushan* v. *United States*, 117 F. 2d 110 (5th Cir. 1941), *cert. denied*, 313 U.S. 574, fees fraudulently converted to the use of defendants were paid and divided through the mails. In *Bradford* v. *United States*, 129 F.2d 274 (5th Cir. 1942), *cert. denied*, 317 U.S. 683, the check representing the proceeds of a fraudulent sale was sent through the mails. In *United States* v. *Leehy*, 34 F. Supp. 982 (W.D. La. 1940),

affirmed 118 F. 2d 246 (5th Cir. 1941), *cert. denied*, 314 U.S. 617, which involved a scheme to cause the State Highway Commission to pay excessive prices for trucks, the Commission's payments were mailed. In *Hart* v. *United States*, 112 F. 2d 128 (5th Cir. 1940), *cert. denied*, 311 U.S. 684, the proceeds of the fraud, in the form of a check, were mailed. *Stephens* v. *United States*, 41 F. 2d 449 (9th Cir. 1930), *cert. denied*, 282 U.S. 880, involved the question whether the occasional legitimate sales by mail made a company engaged primarily in selling fraudulent securities were includible in the indictment. The court held that since the entire enterprise was fraudulent the few legitimate sales needed to dupe the public into continuing confidence in the company were also part of the overall fraud. Finally, in *Morris* v. *United States*, 112 F. 2d 522 (5th Cir. 1940), *cert. denied*, 311 U.S. 653, the matters mailed were premium receipts for fraudulent insurance. In summary, all of respondent's cases involve a use of the mails either to transmit the object of the scheme itself or some of the fundamental material necessary to the perpetration of the scheme.

These cases, we submit, illustrate the rule of *Pereira* that a mailing, to constitute a violation of the mail fraud statute, must be "incident to an essential part of the scheme". Otherwise the mail fraud statute would become a web to catch every conceivable form of local offense. Practically every business activity involves a use of the mails. Doctors' bills are paid through the mails. A local business receives its funds through the mails. Banks are constant users of the mails. Credit cards are in widespread use. Surely no one would say that if the doctor's secretary who sends his bills through the mail, the local businessman's

bookkeeper, or a bank employee who also sends its notices, etc., by mail, steal their employer's money, this constitutes the offense of mail fraud. Yet these analogies fit the present case. Regardless of the existence or nonexistence of the scheme the taxpayers would have had to receive notices from the BISD and to pay their taxes. The fact that someone later stole the funds of the School District is no more an offense against the mail fraud statute than the theft of the doctor's petty cash by his secretary, who sends out his bills. A salesman may use his employer's credit card to buy a few gallons of gasoline or a beer for his personal use; but the fact that the invoice is sent from the Oil Company or the Diners' Club by mail is a slim pretext for federal jurisdiction.

B. The Opinion of the Court of Appeals

The Court of Appeals attempted to sustain the conviction of petitioners on the mail fraud counts on a theory never previously advanced and totally unjustified by the indictment or the facts. It did not attempt to contradict the proposition that the indictment is fatally defective because the assessments levied and paid were lawful and were not "incident" to the scheme to defraud, but to obligations imposed by Texas law. It did not attempt to justify the charge relating to the gasoline used for personal purposes.

The Court of Appeals, however, held that petitioners entered into a "fraudulent scheme of building up sufficient funds for the fraudulent purposes"; that petitioners knew that this would involve use of the mails since "substantially all tax renditions are made by

[9] The record shows that approximately 85% of the tax renditions are by mail (X. 3323).

mail"; and that this constitutes a violation of the mail fraud statute. (XVI, 5825)

This reasoning is simply inapplicable to this case. It might be relevant to a case charging the defendants with the use of mails to send out fraudulent assessments the specific proceeds of which were then appropriated by the defendants. This would be a scheme to defraud individuals by using the mails fraudulently to obtain money from them in the guise of lawful tax assessments, and then to appropriate the receipts of this fraud. But that is not the present case. In the present case, it is not alleged that the assessments were unlawful or fraudulent or that the proceeds of individual assessments were appropriated. The indictment does not charge that the District's assessments were unlawful: no issue with respect to the legality of the assessments was before the jury and no proof was adduced on the point.[10] Under Texas law it would be very difficult to show in any case that assessments were so excessive as to be illegal because School District trustees have broad discretion to accumulate money beyond the immediate needs of the District. *Madeley* v. *Trustees of Conroe Independent School Dist.*, 130 S.W. 2d 929 (Ct. Civ. App. Tex. 1939). And the assessments, unless and until successfully challenged in appropriate state proceedings, represented valid and lawful action of a government body which the taxpayers were required to pay.

[10] The Court of Appeals is totally unwarranted in referring to petitioners' "illegal assessments and levies against taxpayers", saying in a footnote that "the jury could find them to have been illegal because they were fixed in amount by the desire to build up the collections beyond the legal needs for operation". (XVI, 5824)

Moreover, there is no allegation or charge in the indictment, and no evidence or issue submitted to the jury, that petitioners embezzled the receipts of any particular taxpayers: petitioners were not prosecuted for defrauding taxpayers by the use of illegal assessments. The scheme alleged in the indictment is that the petitioners unlawfully embezzled from the general funds of BISD after the taxpayers paid their taxes. A scheme involving fraudulent assessments would have raised entirely different issues, and would have required a trial on the validity of the assessments and the responsibility and powers of the officials of the Board of Equalization. The theory of the Court of Appeals, in essence, is that any collection is "fraudulent" if it builds up a fund from which thefts are later made. This would permit prosecution of any clerk who stole petty cash from his employer, if the clerk had been responsible for sending bills through the mails resulting in receipt of cash which built up a fund from which he embezzled.

In similar vein is the Court of Appeals' statement that reports rendered to the State of Texas were false and that these false reports operated to secure funds from the State. Thus the Court speaks of a scheme by petitioners "to siphon off from the school funds brought in by their false representations to the state . . . ." (XVI, 5824). The Court merely refers to the reports to the State in describing the scheme. It does not purport to rely upon these reports in justification of the indictment under the mail fraud statute, since the mailing of the report is not charged as an offense and could not be. The state capital, to which reports were mailed, is at Austin and any mailings to or from Austin could not be and were not charged as mail fraud violations in the indictment laying venue in Houston.

However, it is indicative of the court's approach that it made this point despite the facts (a) that the indictment does not allege that the falsification of State reports affected or could affect the receipts of BISD (in fact, payments by the state were based solely on the *per capita* population of the district); and (b) there is no suggestion that the population was not correctly reported to the State. Thus there is no allegation or suggestion of any fraud which could have affected the State's payments to the BISD.

The rationalization utilized by the Court of Appeals would uphold the conviction of the petitioners on theories not charged in the indictment or proved. This Court has just held, in *Stirone* v. *United States* (January 11, 1960), that "after an indictment has been returned its charges may not be broadened by amendment except through the grand jury itself". That ruling is applicable here.

C. The Conspiracy Count Falls With the First Count

It is only necessary to add a few words as to Count 20, the conspiracy count of the indictment. That count purports to charge a violation of the conspiracy statute, 18 U.S.C. § 371. But it actually charges only that the petitioners "did . . . conspire . . . to commit the offenses [sic] against the laws of the United States which are fully described and set out *in the first count of this indictment* . . ." (Emphasis supplied). The first count charges only that petitioners caused a taxpayer to take from the mails a notice from the BISD. If we are correct that the first count alleges no offense against the laws of the United States, the conspiracy count necessarily falls with it.

D. Summary

Petitioners' convictions cannot be sustained on the theory that they devised a scheme to defraud the BISD and caused letters to be placed in or taken from the mail as an incident to the execution of the scheme. The evidence shows that the only use of the mails was by taxpayers for the lawful purpose of receiving notices and paying taxes which they were legally obligated to pay and which the BISD was legally obligated to collect and entitled to receive through the mails, and by a gasoline company for the purpose of collecting bills.

Nor can petitioners' convictions be sustained on the theory that there was a scheme to defraud the State of Texas. In the first place, no fraud was established in connection with the obtaining of State available school funds for BISD, such payments being perfectly legal and required by law to be made to the School District on the basis of its scholastic population therein. In the second place, the essential letters relied upon by the government to establish use of the mails as an incident to the scheme to defraud did not have any relationship whatever to the production of State funds. For these reasons the indictment should be dismissed, or petitioners' motion for acquittal, made at the close of the evidence offered by both sides (XV, 5303), should have been granted.

II. THE TRIAL COURT ERRED IN DENYING PETITIONERS' MOTION FOR ACCESS TO GRAND JURY TESTIMONY

A. Petitioners Showed a "Particularized Need for Access to Heras' Grand Jury Testimony"

During the trial, petitioners moved for access to the grand jury testimony of Diego Heras, who was called to testify for the United States. This Court has estab-

lished that a defendant may properly be granted access to grand jury testimony upon a showing of "particularized need". *United States* v. *Procter & Gamble*, 356 U.S. 677; *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395. The showing of need for Heras' testimony may be summarized as follows:

(1) Heras was a key prosecution witness, whose testimony covered 1,008 printed pages, or approximately 23 percent of the entire record. He had served as an official of the BISD for over 20 years, including a large part of the period covered in the testimony, and handled many of the allegedly fraudulent transactions. He prepared fictitious checks, forged endorsements, and cashed the checks. He was named in the indictment as a co-conspirator. His testimony, if believed, furnished most of the elements necessary to convict the petitioners.

(2) Heras was subject to prosecution if he did not cooperate with the government, and may have believed that it was to his interest to testify in support of the prosecution.

(3) Heras had testified before the grand jury which indicted the petitioners on the very day the indictment was returned (Further Supplemental Memorandum for the United States, p. 2);

(4) Heras admitted that he had knowingly made false statements, in writing and under oath, concerning the petitioner Parr (IX, 3173-3180); he was subject to prosecution for them.

(5) Heras had made statements before a state grand jury which conflicted with his testimony at the trial with respect to kickbacks from the proceeds of the checks (VIII, 2658-2659).

(6) There were numerous discrepancies and contradictions between Heras' testimony at the trial and his previous statements and testimony concerning the subject matter of the case. These inconsistencies concerned such vital matters as the preparation of the fraudulent checks (IX, 2888-2890; VIII, 2591-2592, 2529-2530).

(7) The Court of Appeals, noting that Heras had admitted "inconsistencies and discrepancies," commented that "The jury could have believed both that Heras had feathered his own nest at the expense of the board and that his testimony was far from trustworthy" (XVI, 5823).

In summary, the record raised the strongest possible presumption that Heras' grand jury testimony contained statements contradicting his trial testimony which could be used to impeach him. The petitioners showed not only that Heras was untrustworthy; they showed specifically that, both prior to and after the time he testified before the federal grand jury, Heras made false or contradictory statements relevant to his testimony at the trial.

We believe it clear that this showing met, and indeed went far beyond, the requirement of showing a "particularized need". The Courts of Appeals for the Second and Tenth Circuits have agreed that if the defense can show a *likelihood* that the transcript will contain inconsistencies a sufficient showing has been made. In *McKeever* v. *United States*, (2d Cir. Nov. 10, 1959), the Court of Appeals said:

> ". . . In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government wit-

> ness has testified on direct examination, *if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony*, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant. . . ." (emphasis supplied)

In *Zborowski* v. *United States*, (2d Cir., Nov. 10, 1959), the Court said:

> ". . . The rule is that when the defendant points out a possible inconsistency between the trial and the grand-jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes *in camera*. . . ."

And in *Travis* v. *United States*, 269 F. 2d 928 (10th Cir. 1959), the Court, discussing the meaning of "particularized need" as this Court used the phrase in *Pittsburgh Plate Glass Company* v. *United States*, *supra*, speaks of "suggestion of material inconsistency" and likelihood that the grand jury testimony "would produce impeaching material." 269 F. 2d 928, 945.

Thus where the defense shows a likelihood that the grand jury testimony of an important government witness contains inconsistent or impeaching material, a "need" for that testimony has been shown. In the present case, the petitioners made the strongest possible showing that inconsistencies would be found. The only additional showing that could be required would be actual proof that contradictions do exist. But this Court that expressly stated that "Such a preliminary showing would not of course be necessary." *Pittsburgh*

Plate Glass Company v. *United States*, 360 U.S. 395, 401.

In practical terms if the present showing is insufficient, the result will be that defendants cannot get access to grand jury transcripts unless they can show that the transcripts actually do contain contradictions and that these contradictions, if used, would have a decisive effect on the jury. This would be an impossible burden. Such procedure would give the prosecution the exclusive use of grand jury testimony, while denying it to defendants, for rarely, if ever, would it be possible for a defendant to make a more formidable showing of *probable* contradiction and particularized need than is found in the record of the present case. Indeed, few, if any, defendants will ever be able to offer the quality of proof of untrustworthiness and probable contradiction shown here. If petitioners' showing was insufficient, we cannot conceive how any defendant will ever be able to demonstrate a need for grand jury minutes.

B. The Trial Judge Failed to Exercise His Discretion, or Abused His Discretion

When defendants in a criminal case show a "particularized need" for access to grand jury transcripts, this Court has held that it becomes the trial judge's duty to grant such a motion in the exercise of his discretion. *Pittsburgh Plate Glass Company* v. *United States*, *supra* at 400. In that case the trial judge denied the motion because no need "whatever" was shown. *Ibid.* Here, however, the judge held that he had no discretion to grant access regardless of whether or not any need was demonstrated. The Court of Appeals sustained his action on grounds which were

neither considered nor advanced by the trial judge, and which, in any event, would have been insufficient, as we shall show.

The refusal of the trial judge to exercise discretion came when defense counsel was just beginning to establish a basis for his motion. The ruling of the trial judge was made prior to this Court's decision in the *Procter & Gamble* and *Pittsburgh Plate Glass Company* cases, *supra*. The judge said, using the language of finality:

> "It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it." (VIII, 2442).

In short the trial court, without considering the issue of "need", held that it had no *power* to grant the motion for access. The court thus declared that it would deny access regardless of what petitioners could show — "subject to all risks." It held, in absolute terms, that the testimony was "privileged", and there was nothing more petitioners could do except appeal. This absolute refusal is in square conflict with this Court's position, long held, that "disclosure is wholly proper when the ends of justice require it". *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 234, and with this Court's recent opinions (decided after the trial judge's ruling) in *Pittsburgh Plate Glass Company* v. *United States*, *supra*, and *United States* v. *Procter & Gamble*, *supra*.

Nor could denial of access in this situation have been sustained even if it had resulted from an exercise of discretion. The overwhelming showing of need for Heras' testimony found in the present record, including a showing of untrustworthiness and perjury with respect to the instant case, gave petitioners a right to

access here, and denial would have been an abuse of discretion.

In *McKeever* v. *United States*, *supra*, where the trial court denied defense motions for access to grand jury testimony, the Court of Appeals reversed, holding that whenever there is "some basis" to believe that discrepancies may exist, the trial judge must inspect the transcripts, and cannot simply deny the motion for production without determining if there are inconsistencies. *Zborowski* v. *United States*, *supra*, holds the same thing.

Whether the action of the trial court below in denying petitioners' motion for access be deemed a failure to exercise discretion or an exercise of discretion, it is clear that the action was erroneous in the face of the overwhelming show of need.

The Court of Appeals held, however, that the trial court could have denied access to Heras' grand jury testimony, in its discretion, on either of two grounds: (1) because the trial court might have considered that the grand jury transcripts, even if they revealed contradictions, would provide merely "cumulative" evidence for impeachment (XVI, 5834), and (2) because the trial court might have feared that Heras' free and untrammeled testimony before future grand juries would be rendered unavailable (XVI, 5834). The Court of Appeals' holding on these points is in conflict with the principles laid down by this Court to govern the production of grand jury transcripts.

It would be mischievous indeed if trial courts, particularly in jury cases, were to deny access to transcripts on the ground that this unknown evidence would merely be cumulative. The process of impeachment,

based on substantial and not frivolous grounds, may not properly be restricted by blocking out an entire area of material which could be fruitful for further impeachment of the key prosecution witness.

Precisely the same argument accepted by the Court of Appeals for the Fifth Circuit in this case was squarely rejected by the Second Circuit in the *Zborowski* case, *supra*:

> "The government argues that even if it was error for the trial judge not to make the grand jury minutes available to the defendant, that, in any event, this grand jury testimony would have been 'unimportantly cumulative as an impeachment device.' We do not agree.
>
> * * *
>
> "It is not for an appellate court to speculate how much difference the grand jury testimony might have made in the deliberations of the trial jury. Rosenberg v. United States, 360 U.S. 367, 371 (1959). No one can ever say in a particular case just what bit of evidence might turn the tide one way or the other. In every case where a jury has rendered a conviction and where other impeaching evidence is available, it could be argued that the grand jury evidence was merely cumulative. But of course the point of allowing free and full cross-examination of an important witness is to permit this very cumulation of evidence. So long as evidence of this nature is relevant it ought to be freely available to a defendant for whatever use he may wish to make of it."

In the present case if the jury had disbelieved Heras it might well have been reluctant to convict, for Heras' story was the thread which linked together the government's case. Access to Heras' grand jury testimony might have enabled petitioners to establish that he

testified falsely on certain issues which were crucial in the minds of the jury. And, while petitioners did demonstrate certain inconsistencies, the trial jury might have given a weight to discrepancies in grand jury testimony which other discrepancies did not carry. But speculation at this point is futile. It simply is not the trial court's function to say whether evidence of further lying, perhaps on new issues, by a particular prosecution witness would affect the jury's verdict on the whole case. On the contrary, it is the court's duty to see that the defense is not deprived of the right to use such evidence in any appropriate way it can.

Nor could denial of the transcripts here properly be premised on the possibility that Heras might again be called upon to testify before a grand jury, and this time, as a consequence of disclosure of his earlier testimony, prove a reluctant witness. As the Solicitor General acknowledged in his Further Supplemental Memorandum (p. 2):

> ". . . the anticipated trial testimony of these two witnesses [Heras and another] was already clearly set forth in many statements made prior to their appearance before the grand jury (16 as to Heras alone)—statements subsequently turned over to petitioners at trial."

In the face of this admission by the Solicitor General that there were "many statements" by Heras, the contention that revelation of one more version of Heras' testimony would have any effect on this witness' future conduct cannot be taken seriously. Indeed, if he told the truth before the grand jury and the trial jury, he need have no fear. If he did not, the defense was entitled to show the falsehoods.

C. Petitioners' Rights Are Not Affected by the Solicitor General's Representations

If this Court should conclude that the petitioners had a right to access to the grand jury testimony of the witness Heras, their right is in no way affected by the statement of the Solicitor General that no transcript of Heras' testimony was ever taken. In the first place, the Solicitor General's statement cannot be accepted by this Court as proof of the matter asserted. In the second place, even if there was no transcript, petitioners' right of access could have been enforced in other ways.

Petitioners do not question the good faith of the Solicitor General. But his statement raises many important questions. He states that his representations to this Court are based on (1) the fact that the grand jury assignment book in the United States Attorney's office (which petitioners have not been permitted to see) fails to show that a court reporter was present when Heras was examined on March 6, 1956, and (2) the recollection of a court reporter (three and a half years after the event) that he did not record the grand jury testimony of either Heras or any other witness on March 6, 1956.

With all due deference, such ex parte, unsworn "evidence" cannot be accepted as judicial proof. Even if the record were silent on the matter, petitioners would be entitled to make further inquiries to find out by testimony if Heras' testimony was recorded; if not, why not; whether notes were taken or memoranda made, etc. But the record is not silent. It clearly and unequivocally establishes that there was a transcript of Heras' testimony in existence, and in the government's possession. These facts were brought out in the record,

not in a casual manner, but in response to direct inquiry *on three separate occasions*, the third by the trial judge who wanted to know whether a transcript existed and whether the prosecuting attorney had it. On three separate occasions, the government's chief trial lawyer, Mr. Wilkey, stated that the transcript existed and was in his office. This Court most assuredly should not permit contradiction of the record in this casual manner, particularly by the Government of the United States.

But even if it is a fact that no transcript of Heras' testimony was ever taken, that fact could not have deprived petitioners of the right to the use of grand jury testimony which they assert here. Certainly, if notes or memoranda of his testimony are in existence, we would be entitled to them. If petitioners did have a right to use this testimony the trial court could, in the exercise of its discretion, have protected this right by other means. It might have allowed a different scope to cross-examination, or it might have given petitioners an opportunity to prove that testimony without using a transcript. Rule 6 (e) of the Federal Rules of Criminal Procedure permits the trial court to direct members of the grand jury to testify when justice so requires. The Rule reads, in pertinent part:

> ". . . Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

And the propriety of testimony by grand jurors is supported by many decisions. E. g., *United States* v. *Farrington*, 5 Fed. 343, 346-347 (D.C. N.D. N.Y. 1881); *Atwell* v. *United States*, 162 Fed. 97, 100-101 (4th Cir. 1908); *Latham* v. *United States*, 226 Fed. 420, 423 (5th Cir. 1915); *United States* v. *Perlman*, 247 Fed. 158, 160-161 (S.D. N.Y. 1917); *United States* v. *Silverthorne*, 265 Fed. 853, 855 (N.D. N.Y. 1920); *Schmidt* v. *United States*, 115 F. 2d 394, 396-397 (6th Cir. 1940); *United States* v. *American Medical Ass'n*, 26 F. Supp. 429, 430-431 (D.C. D.C. 1939).

Thus if a transcript was unavailable and this fact had been made known in the trial court, the petitioners could nevertheless have sought to determine the substance of Heras' grand jury testimony by other means if they were entitled to use that testimony as we assert they were. It follows that if the denial of petitioners' motion was error, reversal is required whether or not a transcript actually exists.

III. THE GOVERNMENT SO ABUSED ITS FUNCTIONS AS PROSECUTOR THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO REQUIRE DISMISSAL OF THE INDICTMENT

The disclosure by the Solicitor General that no transcript of Diego Heras' testimony before the grand jury was ever made, considered along with other extraordinary aspects of this case, presents this Court with a grave new problem. We believe the government's overall conduct in this case was such an abuse of its prosecutorial responsibility that this Court should exercise its supervisory powers to require dismissal of the indictment. Our reasons, discussed hereinafter, are as follows:

(1) The prosecution used before the grand jury a witness, Heras, known to have given false statements with respect to this matter, and to be unreliable;

(2) Despite this knowledge, the prosecution failed to make a record of Heras' testimony, although the testimony of other witnesses was transcribed;

(3) Despite the above, the prosecution used Heras as its principal witness at the trial;

(4) The prosecution failed to disclose at the trial that no transcript of Heras' testimony was in existence, and instead represented that such a transcript was in its possession: at the very least, this is inexcusable negligence and disregard of the obligations which the prosecuting attorney owes to the court and the defendants;

(5) The indictment represented an attempt to prosecute the petitioners, some of whom are prominent political figures, for a local crime for which they had been prosecuted in the state courts;

(6) The indictment was drawn in inverted form so as to cause the trial of petitioners to be held in Houston, 250 miles from their residence and the scene of their activities in circumvention of Rule 18 of the Federal Rules of Criminal Procedure.

A. The Failure to Make a Transcript and Use of Heras as a Witness

The law with respect to the taking of transcripts of grand jury testimony has been in a state of change. In the early part of this century, the majority view was that no stenographer could be present during grand jury sessions, and indictments were subject to dismissal if it appeared that such an unauthorized person

was present. E. g., *United States* v. *Edgerton*, 80 Fed. 374 (D. Mont. 1897); *United States* v. *Rubin*, 218 Fed. 245 (D. Conn. 1914); *United States* v. *Philadelphia & R. Ry. Co.*, 221 Fed. 683 (E.D. Pa. 1915); *Latham* v. *United States*, 226 Fed. 420 (5 Cir. 1915); *United States* v. *Goldman*, 28 F. 2d 424 (D. Conn. 1928). Another line of decisions held, however, that a stenographer's presence did not warrant dismissal of an indictment. E. g., *United States* v. *Rockefeller*, 221 F. 2d 63 (S.D. N.Y. 1914); *Wilson* v. *United States*, 229 Fed. 344 (2d Cir. 1916); *United States* v. *Morse*, 292 Fed. 273 (S.D. N.Y. 1922); *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (D. Md. 1931).

In 1933, Congress adopted the latter rule. Act of May 18, 1933, 48 Stat. 58. And Rule 6(d) of the Federal Rules of Criminal Procedure, adopted by this Court, states that "a stenographer *may* be present" (emphasis supplied). Thus, today the taking of a transcript is discretionary.

The government has a right to use grand jury testimony at the trial for various purposes, and it frequently uses that right. *Socony Vacuum Oil Company* v. *United States*, *supra*.

The law has also been developing with respect to the rights of defendants growing out of grand jury proceedings. Today, as we have pointed out in the previous section of this brief, a defendant in a criminal case has certain rights with respect to the use of grand jury testimony in the presentation of his defense. E.g., *Pittsburgh Plate Glass Company* v. *United States*, *supra*. And a defendant may also have the right to have the trial and appellate courts examine the transcript of grand jury testimony themselves to search for inconsistencies. E.g., *McKeever* v. *United States*, *supra*.

In the light of these cases, we do not think that a prosecutor today can be conceded a limitless discretion to record or not record the grand jury testimony of any particular witness as the interests of the prosecution may suggest. It has often been held that discretion may not be exercised in an unlawful or improper manner. Thus there may be unusual circumstances where a specific instance of failure to record a grand jury witness' testimony is an abuse of discretion. We believe that the extraordinary circumstances of this case present a situation where the prosecutor's asserted failure to record the testimony of a particular witness was an abuse of his power. These circumstances may be summarized as follows:

(1) The grand jury conducted a lengthy investigation into the petitioners' affairs, hearing testimony over a period of many months. So far as appears, a transcript was made on every day the grand jury sat except the last day.

(2) On the day on which the grand jury was due to vote for or against an indictment, the prosecution for the first time produced a witness, Diego Heras, who had long been known to the prosecution and who was the most important prosecution witness at the trial.[11]

(3) As the prosecutor knew well, Heras had perjured himself in statements made to the government.

[11] The Solicitor General states that another witness, so far unidentified, was also examined on the same day and that his testimony was not recorded either. According to the Solicitor General, this witness also had made many previous statements. Further Supplemental Memorandum for the United States, p. 2. Since only the most important prosecution witnesses fit this description, it is apparent that this witness, like Heras, was expected to play a vital role at the trial.

There were substantial grounds for believing he would not hesitate to do so again. By his own testimony, he had been engaged in fraudulent activities, including the forging of checks. His previous statements were not consistent, and were contradicted by other witnesses.

(4) Heras was under heavy pressure to render assistance to the prosecution in his effort to obtain an indictment. He was an admitted accomplice and co-conspirator who was subject to indictment himself if he failed to cooperate with the prosecution.

(5) The prosecution also knew that Heras, in the role of a witness who had turned state's evidence, and a key witness, would be subject to searching cross-examination at the trial and that every attempt would be made to discredit the reliability of his testimony. Inconsistencies in Heras' story of the alleged fraud would be of the greatest value to the defense.

Although the Federal Rules of Criminal Procedure give the prosecutor discretion with respect to the presence of a stenographer at grand jury sessions, it by no means follows that Rule 6(d) was intended to invite the prosecutor to select which witnesses' testimony in a particular investigation shall be recorded. It is difficult to justify a decision to treat witnesses in the same case differently. Such differentiation is, we believe, suspect by its nature, and the court should scrutinize such action with the greatest care. But even if it might sometimes be permissible to transcribe the testimony of some witnesses but not others, Heras was the type of witness for whom a transcription should have been imperative.

We submit that the responsibilities of a prosecutor with respect to a witness like Heras are far higher than

in the case of a witness whose lack of veracity is not known to him. The prosecutor has a constitutional duty not to obtain an indictment or conviction based in whole or in part on perjured testimony. *Mooney* v. *Holohan*, 294 U.S. 103, 112; *Pyle* v. *Kansas*, 317 U.S. 213, 216; *Napue* v. *Illinois*, 360 U.S. 264, 269. The taking of a transcript is unquestionably a safeguard against perjury. As the Court of Appeals for the Second Circuit observed many years ago:

> "We are satisfied that the preservation of an accurate record of the testimony submitted to a grand jury tends to advance the ends of justice. The knowledge that there is being taken a record of such sort that, in any future prosecution for perjury, it will probably be taken by a trial jury as a correct one is a wholesome check on the witnesses who are testifying before a grand jury." *Wilson* v. *United States*, 229 F. 344, 348 (2d Cir. 1916).

Besides restraining a witness with a tendency toward inaccuracy or falsehood, a transcript makes it possible for the trial jury to be advised if the witness' testimony before the grand jury and at the trial is inconsistent. The courts have held that it is much more important for the trial jury to have this information than it is to obtain a conviction. Indeed, the Court of Appeals for the Second Circuit has said that the prosecutor has a *duty* to advise the trial court of inconsistencies between a government witness' testimony at the trial and his testimony before the grand jury. *McKeever* v. *United States*, *supra*, footnote 2.

The decision of the prosecution to call Diego Heras as a witness at the trial, with knowledge of his record of inconsistencies and false affidavits, was of doubtful propriety at best. The decision of the prosecution to

call this same witness before a grand jury under circumstances which were nothing less than an invitation to irresponsibility and perjury was a grave abuse of the prosecution's preeminent duty to see that justice is done. Compare *Mesarock* v. *United States*, 352 U.S. 1, where the Solicitor General, having discovered that a government witness in a criminal trial had perjured himself elsewhere, advised this Court that, while he believed the witness' trial testimony to have been true, the case should nevertheless be remanded for inquiry into the credibility of this testimony. The Court went further than the Solicitor General suggested and, in a decision from the bench, ordered a new trial.

We have noted above that defendants have certain fundamental rights with respect to the use of grand jury transcripts and that they also have the right to court review of decisions denying access to transcripts. But if the prosecution may transcribe or fail to transcribe as it pleases, it is child's play to prevent any defendant from having the benefit of these rights.

The prosecution will record the testimony when, in the case of a reluctant witness, it wishes to use it at the trial, and will fail to do so if the witness is friendly to the prosecution and vulnerable to attack by the defense. All the prosecution has to do when a witness of doubtful probity goes on the stand before the grand jury is to excuse the stenographer, and then the witness is effectively immune from impeachment. We cannot believe that rights recognized by this Court may so easily be defeated.

In this connection, it is highly relevant that the grand jury is not the instrument of the prosecutor, to use in any manner which he finds expedient, but an arm of the

court." *Cobbledick* v. *United States*, 309 U.S. 323, 327. Failure to make a transcript of a particular witness' testimony to that extent deprives the court of power to supervise grand jury proceedings, and hence should not be countenanced when done solely for tactical advantage or when the prosecution has reason to suspect that it may operate to shield perjury or to prejudice the defense.

What the prosecutor did in this case was to transcribe where he wished to do so and make no transcription where he thought it would hurt his case. This Court should not sanction such procedure. Impeachment of opposing witnesses is no minor right. Only recently this Court observed that:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocense, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

We think it not amiss to point out that, as a consequence of the government's asserted failure to make a transcript of Heras' testimony, and its failure to disclose this until after the petition for certiorari and brief in opposition had been filed in the Court, this entire case has been tried, appealed and brought to the Supreme Court on an issue which the Solicitor General now says does not exist. At the same time one of the principal issues has never previously come to light.

It is apparent that the conduct of the trial and some of the issues presented to the trial court and the Court of Appeals might have been significantly different had the defense lawyers known all of the circumstances, and had Mr. Wilkey not advised the trial court that a transcript of Heras' testimony was in his possession.

More serious still, the long delay in disclosing the assertedly true facts may have damaged the defense—perhaps irretrievably, for who can say what the grand jurors will now remember? As a practical matter there may be no way in which the petitioners can now, three and a half years after Heras' appearance before the grand jury, be given a fair trial on the present indictment.

In its supervision of criminal prosecutions arising in the federal courts, this Court has often undertaken to correct procedures which represent a denial of fundamental fairness. Where tainted testimony occurs in a federal trial, the court has not hesitated to make drastic use of its supervisory powers to "see that the waters of justice are not polluted." *Mesaroch* v. *United States*, 352 U.S. 1, 14. This Court has observed this principle consistently:

> ". . . The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard

can be asserted." *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115, 124.

The unchecked testimony of Heras, covering 100 pages of the record, has tainted this case beyond the ability of any appellate court to remove the testimony's prejudicial effects. "The government of a strong and free nation does not need convictions based upon such testimony." *Mesarosh* v. *United States*, *supra* at 14.

The Other Circumstances Showing an Abuse of the Prosecutor's Function

As we have shown, the government knew that Heras was a co-conspirator; that he had lied in connection with the matters and persons under investigation; that he had sworn falsely in affidavits to the FBI; and that he was necessarily under pressure to be accommodating to the prosecution.

Nevertheless, they produced him as a witness before the grand jury on the last day of its consideration of this matter.

Nevertheless, they now assert, they did not record his testimony although the testimony of all witnesses on all preceding days had been recorded.

Nevertheless, they produced him at the trial as a key government witness.

At the trial, their chief counsel, now Assistant Attorney General of the United States, thrice represented that a transcript of Heras' testimony existed and he stated that this transcript was in his office. It was only after petition for certiorari and briefs had been filed in this Court, that the Solicitor General volunteered the representation that Heras' testimony before the grand jury had not been recorded.

These startling events are merely the culmination of a process which, we submit, requires the exercise of the supervisory power of this Court.

We have earlier pointed out that this prosecution represents an effort by the federal prosecutors to assert jurisdiction over a local crime. The record makes clear the highly political setting of the case in the State of Texas (XVI, 5721-5728), and the Solicitor General's Brief in Opposition to certiorari does not avoid the reference (p. 9). The federal prosecutions came hot on the heels of state prosecutions, which proved abortive.

Having decided to prosecute, the federal agents carefully chose a forum. They did not wish to try petitioners in the Corpus Christi Division in which they reside, and in which the School District is located and in which the events in issue really took place. They chose to bring them to trial in the Houston Division, about 250 miles from their homes.

Efforts by the federal government to try him at distant points to avoid the judgment of a local jury are nothing new to petitioner Parr. As this Court well knows from the 1956 case of *Parr* v. *United States*, 351 U.S. 513, the United States in 1954 indicted Parr in the Corpus Christi Division for income tax evasion. On motion, the trial court transferred the case to the Laredo Division. The Government, unwilling to try the petitioner Parr in the Laredo Division, obtained a new indictment in the Austin Division of the Western District of Texas and obtained leave to dismiss the first indictment. This Court held, five to four, that petitioner could not appeal the dismissal of the earlier indictment until after trial at Austin. *Parr* v. *United*

States, supra. While the majority intimated no opinion on the propriety of the government's intended change of venue, the four dissenting justices deemed this attempted action to be improper. It is interesting that the government has taken no action on the pending income tax indictment since this Court's decision—years ago—but has allowed that indictment to remain pending while the mail fraud case was pressed (XII, 4175-4176).

In the present case, in order to try petitioners in Houston, the government has had to resort to extreme measures. Rule 18 of the Federal Rules of Criminal Procedure requires that a defendant be tried in the district and *division* where his crime was committed. Petitioners did not live or work in Houston. All of their business and that of the School District was transacted in the Corpus Christi Division. To give the Houston Division venue, it was necessary for the indictment to allege crimes which, by hypothesis, occurred in Houston. This led to curious results: (1) No use of the mails by petitioners in Benavides or the Corpus Christi Division is charged as a crime; (2) the "crimes" alleged consist entirely of normal, lawful uses of the mail in Houston by innocent taxpayers and an owner of gasoline stations, as we have discussed; and (3) petitioners are accused of having "caused" these mailings.

We believe that this case presents an extraordinary record of misuse of the federal criminal procedures in an effort to secure the federal conviction of persons who should have been tried by state courts. Venue was placed in a distant forum. The Mail Fraud Statute was stretched beyond the breaking point in an effort to give the federal court jurisdiction. When to this is added

the use of a witness such as Heras, the failure to make a transcript of his grand jury testimony on the last day (when all the previous and less important witnesses had testified with a stenographer present), and the allegedly erroneous representations made to the trial court which caused this case to be tried and appealed on an incorrect theory, it is apparent that this case calls for an exercise by the Court of its supervisory powers over federal criminal trials.

CONCLUSION

For all of these reasons, petitioners respectfully pray that this Court reverse the judgment below and order the dismissal of the indictment or the granting of petitioners' motion for acquittal.

Respectfully submitted,

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APPENDIX

Exhibits involving use of the mails charged as offenses in the nineteen substantive counts of the indictment:

Count

1 Humble Oil & Refining Co. taxes for 1952

G. Ex. 149—Letter 9/26/52 from BISD, Diego Heras, to Humble Oil & Refining Co., J. A. Mowlam

2 Humble Oil & Refining Co. taxes for 1952

G. Ex. 157—Letter 7/18/52 from BISD, O. Carrillo, Sr. to Humble Oil & Refining Co., H. L. Stone, notice of hearing before Board of Equalization

3 Humble Oil & Refining Co taxes for 1952

G. Ex. 158—A—Humble Oil & Refining Co. check, 9/26/52 for $43,166.07

C—Letter of transmittal of Humble's check in the amount of $43,166.07

4 Humble Oil & Refining Co. taxes for 1953

G. Ex. 160—A—Humble Oil & Refining Co. check to BISD, 9/24/53 for $53,807.35

C—Humble Oil & Refining Co. letter of transmittal of check for $53,807.35

5 Humble Oil & Refining Co. taxes for 1953

G. Ex. 159—Notice of hearing of the Board of Equalization of the BISD, dated May 20, 1953, fixing a hearing on June 2, 1953; notice signed by O. Carrillo, Sr., addressed to Humble Oil & Refining Co., H. L. Stone

6 Humble Oil & Refining Co. taxes for 1951

G. Ex. 156—A—Humble Oil & Refining Co. check to BISD, 7/25/51 for $34,285.09

B—Letter of 9/26/51 from Humble Oil & Refining Co., H. L. Stone to Diego Heras, BISD, transmitting Humble check for $34,285.09

7 C. W. Hahl Co. taxes for 1952

G. Ex. 148—Letter 12/3/52 from BISD, Diego Heras to C. W. Hahl Co., Mr. Dan Shepler

8 C. W. Hahl Co. taxes for 1953

G. Ex. 167—A—C. W. Hahl Properties check to BISD, 9/25/53 for $544.21

B—C. W. Hahl Properties letter, 9/28/53, transmitting check for $544.21

9 C. W. Hahl Co. taxes for 1951

G. Ex. 165—A—C. W. Hahl Co. check to BISD, 9/21/51 for $555.25

B—C. W. Hahl Co. letter of transmittal, 9/21/51 of check to BISD for $555.25

10 C. W. Hahl Co. taxes for 1952

G. Ex. 166—A—C. W. Hahl Co. check to BISD, 9/26/52 for $451.70

B—Letter of 9/27/52 from C. W. Hahl Co. to BISD transmitting check for $451.70

11 The Texas Company taxes for 1951

G. Ex. 151—A—The Texas Company check to BISD, 9/27/51 for $13,532.64

B—Statement accompanying the Texas Company check, 9/27/51

12 The Texas Company taxes for 1952

G. Ex. 153—A—The Texas Company check to BISD, 9/26/52 for $13,078.72

B—The Texas Company statement accompanying check, 9/26/52

13 The Texas Company taxes for 1953

G. Ex. 152—A—The Texas Company check to BISD, 9/30/53 for $14,665.04

B—The Texas Company statement accompanying check, 9/30/53

14 The Texas Pipe Line Co. taxes for 1953

G. Ex. 154—A—The Texas Pipe Line Co. check to BISD, 9/30/53 for $330.84

C—Letter from the Texas Pipe Line Co., Herschel Harrington, to BISD, 9/30/53

15 J. E. Beall taxes for 1953

G. Ex. 44—Check of J. E. Beall to BISD, 9/30/53 for $415.72

16 J. E. Beall taxes for 1952

G. Ex. 33—Check of J. E. Beall to BISD, 10/24/52 for $355.55

17 Continental Oil Co. account with BISD

G. Ex. 92—A—Continental Oil Co. envelopes with window opening, dated June 1, 1953

B—Continental Oil Co. monthly invoices to BISD, 5/25/53

18 Continental Oil Co. account with BISD

G. Ex. 96—Photostat of BISD check to Continental Oil Co., 3/31/53 for $353.02

G. Ex. 95—Bottom half of attachment to BISD check for $353.02, payable to Continental Oil Co.

19 Continental Oil Co. account with BISD

G. Ex. 90—Continental Oil Co. monthly invoices to BISD, 3/30/53 for $353.02

Note: In connection with Counts 17, 18 and 19, see also G. Ex. 91, 93 and 94, A, B, C and D, involving monthly invoices and attachments.

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No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE B. PARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (XVII, 5819–5835),[1] is reported at 265 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1959 (XVII, 5835–5836), and a petition for rehearing was denied on August 12, 1959 (XVII, 5836–5837). The petition for a writ of certiorari was filed on September 10, 1959, and was granted on December 7, 1959 (XVII, 5838; 361 U.S. 912). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

[1] To facilitate use of the references to the record, both the volume and page number are given.

QUESTIONS PRESENTED

1. Whether the diversion from a school district of funds received through the mails violated the mail fraud statute, where the use of the mails was a necessary part of a continuing scheme to defraud.

2. Whether the government's failure to record and transcribe the grand jury testimony of a prosecution witness was improper.

3. Whether the district court erred in refusing at the trial to give defense counsel access to such grand jury transcript, which was then believed to exist, where it was sought as of right and without attempting to show any particularized need therefor.

STATUTE INVOLVED

18 U.S.C. 1341 provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the

direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

A twenty-count indictment filed in the District Court for the Southern District of Texas charged petitioners in counts 1 to 19 with mail fraud (18 U.S.C. 1341) and in count 20 with conspiracy to commit mail fraud (18 U.S.C. 371) (I, 10–30). The first count gave a general description of the scheme, set out three continuing fraudulent representations made by petitioners, alleged in general terms the ways in which petitioners acted to carry out the fraud, and alleged a specific use of the mails to further the fraud (I, 10–17). Each of counts 2 to 19 alleged a different specific use of the mails (I, 17–27). The conspiracy count realleged the various specific uses of the mails as overt acts, as well as additional overt acts (I, 28–30).

On July 17, 1957, following a jury trial, all of the petitioners were found guilty of one or more counts and received sentences as shown in the following table (XVI, 5652–5667):

Petitioner	*Counts, findings of guilty*	*Sentence*
Parr	1–20	5 years on each count, 1–10 concurrent, 11–20 concurrent but consecutive to 1–10, $1,000 cumulative fines on counts 1–20.
Chapa	1–20	5 years on each count, all concurrent.

Petitioner	Counts, findings of guilty	Sentence
Donald	1–14, 17–20	4 years on each count, all concurrent.
Garza	all except 7	3 years on each count, all concurrent, suspended during 5-year probation period.
Garcia	4, 5, 8, 13–15, 17–20	3 years on each count, all concurrent, suspended during 5-year probation period.
Saenz	all except 7	3 years on each count, all concurrent.
Oscar Carrillo, Sr	1–20	4 years on each count, all concurrent.
Oliveira	20	2 years and a $7,000 fine, imprisonment suspended during 5-year probation period.
O. P. Carrillo	20	2 years, suspended during 5-year probation period.
Texas State Bank	1–20	$100 cumulative fines on each count, a total of $2,000.
San Diego State Bank	1–3, 7, 10–12, 16, 20	$100 cumulative fines on each count, a total of $900.

On appeal, the court of appeals affirmed.

A. THE SCHEME TO DEFRAUD

1. THE SOURCE OF THE FUNDS

The Benavides Independent School District ("B.I.S.D.") is located in Duval County, Texas (III, 719). It is governed by a seven-man Board of Trustees (III, 727) which operates two schools within the District: one at Freer, Texas, the other at Benavides, Texas (III, 724). The enrollment at the two schools is almost evenly divided; during the period of the conspiracy (September 1949 to February 1954) it remained stable at about 2,100 pupils (III, 858–859). During the life of the scheme it was the prac-

tice to operate the schools separately, to the extent that three trustees living in Freer were responsible for the Freer school, and four trustees living in Benavides were responsible for the Benavides school (III, 725–726). The monies actually spent on education were apportioned equally between the two schools (III, 731; Govt. Exs. 85 EEE; 86 PP, RR, YYY, BBBB). However, the Benavides members entered into contracts for the Board, hired the Board's attorney, handled the Board's relationship with the tax assessor-collector, filed the annual reports of school funds required by the State of Texas before state funds could be paid, kept control of the payment of all expenses of both schools, and did the district's banking (III, 682, 726–728, 734).

Six of the individual petitioners were officially connected with the School District. David Carrillo Chapa was Tax Collector-Assessor (III, 840, 864; VII, 2322; X, 3347). His son, Oscar Carrillo, Sr., was Secretary of the school board (*ibid*). Another son, O. P. Carrillo, was attorney for the board from February 1953 to February 1954 (VI, 1999–2000; VII, 2001). Octavio Saenz, Jesus Garza, and Santiago Garcia were three of the four Benavides members of the Board of Trustees; Saenz was the president (III, 834; V, 1210).[2] Petitioner Donald was the cashier of petitioner Texas State Bank, which was the official depository of B.I.S.D. funds; petitioner Oliveira was a director of that bank; and petitioner Parr was the president of, and active member in, both petitioner

[2] The fourth Benavides Board member, Richard Barton, took little part in the Board's activities (IV, 969–970).

banks (III, 900; IV, 901–902, 924, 998–1001, 1008–1009, 1016; VI, 1728, 1929–1930; Govt. Exs. 22, 23, 45, 46).

Although petitioner Parr did not hold any official position (III, 859, 862), he was the most important figure in the School District.[3] The books and records of the District were kept at his office building in San Diego, Texas, until July, 1951, when he gave permission to move them back to Benavides (VII, 2361; X, 3302, 3324–3326). He had as easy access to the records as a member of the school board (X, 3302), attended all important meetings of the board (VII, 2388; X, 3304–3305, 3471), countersigned all B.I.S.D. checks after June, 1950 (VII, 2364; X, 3310–3311); and personally approved all salary advances to employees of more than $100 (X, 3314, 3427, 3472). Parr's control of the school board was generally exercised through petitioner Chapa.[4]

Parr's control of School District affairs further rested on his dominant position in the petitioners Texas State Bank of Alice and San Diego State Bank. Parr was president, principal stockholder, chairman

[3] As Benson, the auditor for the School District put it, "If I had made a report to the trustees, I might as well have gone to the court house and talked to the furniture. There wasn't but one man to talk to. That was Mr. Parr" (X, 3429).

[4] As W. M. Benson testified (X, 3430):

Q. "He [Parr] wasn't attempting to come down there and crack the whip, and order things around, and direct how affairs were to be conducted at those meetings?"

A. "No, he did that through Mr. Chapa."

Q. "He did?"

A. "Any directions there would usually come down through him [Chapa]."

of the loan committee, and dominant influence in the affairs of the Texas State Bank (the official depository of school board funds). Among the directors and stockholders of the bank, only petitioner Oliveira was not a Parr relative (Govt. Exs. 22 and 23; VI, 1929–30). Petitioner Donald was actively in charge of the internal affairs of the bank, the personnel, tellers' cages, and, as we show (*infra*, pp. 11–14), was directly responsible for the cashing of the fictitious checks in bundles (IV, 1005, 1091; VI, 1928, 1944). Parr also was the president of the petitioner San Diego Bank, where taxpayers' checks were cashed or deposited (Govt. Exs. 45 and 46; V, 1588–90; VI, 1689–97, 1731, 1734, 1756–62). Thus, the School District funds were at all times under the control of the petitioners—particularly Parr, Chapa and Donald.

There are about 75 oil fields within the B.I.S.D. (VII, 2228). 75–85% of its taxable property value consists of mineral rights (X, 3323), which are primarily owned by non-residents. Their size ranges from The Humble Oil and Refining Company, whose interests constitute more than 10% of the total valuation, to persons holding a one-ten thousandth interest in an unproved acreage valued at $10 (See Govt. Exs. 34, 35, 210, 225, 230). The District's total tax assessment was estimated at about $400,000 in 1949, and at about $650,000 for 1952 (X, 3377–3378, XIII, 4629). The District tax rolls themselves show a total tax assessment of $519,613.51 for 1953 (Govt. Ex. 34),[5]

[5] The annual reports of the Board for the years 1949 through 1952 show lesser amounts as tax income: $310,840.59 for 1949; $295,161.25 for 1950; $370,852.42 for 1951; and $385,084.96 for 1952 (Govt. Ex. 1, pp. 123, 134; Govt. Ex. 2, pp. 120, 123;

and, as we show *infra*, pp. 18–19, some taxable property was omitted from the rolls in that year. The State of Texas, Duval County, and other outside sources contributed an average of over $140,000 per year to the School District during the life of the scheme (Govt. Exs. 1–5). In 1953 and 1954, the Freer school budget was a little more than $200,000 (V, 1209).[6] Since each school received an equal share of the funds actually spent for school operation (*supra*, p. 5), $400,000 was required to operate both schools. Deducting that $400,000 from the total receipts, there would still be large sums available each year to meet the operating expenses of the School District's office, a small frame structure in Benavides in which no more than six persons were employed to

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Govt. Ex. 4, pp. 128, 130; Govt. Ex. 5, pp. 124, 134). However, the total assessed valuation for both 1950 and 1951 was reported as $24,878,748. The total tax rate was increased from $1.50 in 1950 to $1.75 in 1951 (Govt. Ex. 2, p. 124; Govt. Ex. 4, p. 133). If the $295,161.25 figure for 1950 is assumed to be correct, the increased rate for 1951 should have produced tax revenues of only $339,354.79, instead of $370,852.42. Thus, it appears that the figure for 1950 is too low on its face.

There were, of course, other sources of revenue during these years, such as more than $627,000 derived from new bond issues (Govt. Ex. 1, p. 134; Govt. Ex. 2, p. 123).

[6] The Freer budget increased from $200,000 to $278,000 the year after petitioners left the Board of Trustees (V, 1209–1210). That the figure of $200,000 for actual operating expenses was not exceeded in earlier years appears from the fact that the gross payroll for the Freer school was $12,793.27 in October 1951 (Govt. Ex. 205) and $13,139.00 for February 1952 (Govt. Ex. 206). Even if the average of these figures is projected over a twelve-month period, the maximum figure for gross payroll would be $155,593.68—including teachers, supervisors, bus drivers, janitors, school clerical workers, and cafeteria employees. This would leave almost $45,000 to pay all other obligated operating expenses for a 1,000-pupil school.

handle business records (VII, 2321, 2324). Yet the District was "two and a half years in debt" when petitioners relinquished control of it in February 1954 (X, 3435).

In regard to the tax collecting process, various taxpayers testified that they paid their taxes to the B.I.S.D. only after receiving a notice of taxes due, both notice and responsive payment being by mail (V, 1315–1316, 1323, 1332, 1338, 1348, 1352, 1370, 1384; XI, 3708, 3737, 3740–3741, 3759). Before such notices were sent out, alphabetical lists of owners and their property were prepared [7] and turned over to a Board of Equalization appointed by the Board of Trustees. The Board of Equalization met in June or July and fixed final property valuations. Next, the property tax rolls were prepared in the office of the Tax Collector-Assessor. Statements of taxes due were mailed to the taxpayers in September for the fiscal year September 1–August 31. Almost all tax payments were received by mail and tax payment receipts were returned by mail (V, 1579–1584; VII, 2214–2236). In 1951–1953, the handling of the mail was under the direct supervision of petitioners Chapa and Oscar Car-

[7] Because the property interests are so complex (*i.e.*, undivided fractional interests, etc.), the District followed the practice of having the taxpayers themselves report their holdings. Starting in 1952, these reports were turned over to Thomas Y. Pickett & Company, a private group of valuation engineers and accountants, who would go into the oil fields and determine the value of each property interest, whether real or personal. The Pickett Company then itself was responsible for the preparation of the ownership lists (VII, 2215–2216, 2236)—but not the tax rolls.

rillo, and their personal secretaries (V, 1584; VII, 2367–2370; Govt. Exs. 27, 210, 225).

State funds were paid to the School District on a per capita basis. To obtain them it was necessary, under state law, for the B.I.S.D. to file annual reports of its financial transactions at Austin, Texas, with the Texas Education Agency (III, 697–698, 709). If the reports revealed any surface discrepancy, the state funds would be withheld. These reports, listing each check paid by the School District (and showing the number of the check, the date it was made, the name of the payee, and the date the check was cashed), were prepared at the Texas State Bank and were signed by petitioner Saenz as President of the Board of Trustees and by Jewel Mayfield (a co-conspirator but not a defendant) or by petitioner Donald for the Texas State Bank (IV, 1165–1168, Govt. Exs. 1–4).

2. THE MISUSE OF THE FUNDS

The theory of the indictment was that petitioners defrauded the School District, its taxpayers, the State of Texas, and Texas taxpayers, through falsely representing (1) that all School District funds were used for school purposes and (2) that the annual reports filed by the B.I.S.D. with the Texas Education Agency were true and correct (I, 13). It was alleged that petioners had—year after year—mailed out tax statements, collected taxes, returned receipts by mail, and maintained control over the District and its depository bank for the express purpose of carrying out the scheme to defraud. (I, 13–17). The government's evidence showed that petitioners, who were obligated

by state law to spend all school funds for school purposes, had misappropriated sizable amounts of District funds and had falsified the annual reports. Three main devices were used to drain off the funds. (1) A large number of the checks shown on the annual reports filed with the Texas Education Agency as having been drawn against B.I.S.D. funds were payable to fictitious persons. (2) Another large group of checks, payable to living persons, were for services which actually were never rendered, or for materials which were never delivered. Eliminating duplications, the checks in these two categories, the proceeds of which petitioners misappropriated, total almost $190,000. (X, 3349–3350; Govt. Exs. 9, 10, counts 1–14). (3) Petitioners intercepted checks received by mail in payment of property taxes before the checks were deposited in the depository bank. The checks were then cashed and the proceeds appropriated by the petitioners (counts 15, 16; Govt. Exs. 33, 44). (4) In addition, petitioners charged the School District for various items which they used personally (V, 1490–1506; Govt. Exs. 90–96, 99, 100, counts 17–19).

a. *Checks payable to fictitious persons*—From the inception of the scheme in late 1948 or early 1949, until its collapse in February 1954, large bundles of B.I.S.D. checks, drawn to the order of fictitious payees, were regularly cashed at the petitioner Texas State Bank. The total face amount of each bundle of checks ranged from three to twelve thousand dollars; a group of such checks would usually be cashed once or twice a month. Bank tellers Williams,

Fitch, and Ray recalled that the checks would usually be taken to petitioner Donald, who would cash them at one of the tellers' cages and seal the currency in an envelope. If Donald was absent from the bank, the checks would be cashed directly by one of the tellers. (III, 738–740, 745, 755, 768, 796, 804, 814–815, 822, 827; IV, 1005, 1010–1016, 1023, 1032–1033, 1091–1093, 1095–1098, 1154–1159; VI, 1979–1982; Govt. Ex. 9).

Special rules were adopted by Donald with respect to the bundles of B.I.S.D. checks brought to the bank. No endorsements were required on the checks, and no teller's cash stamp was placed on them when they were cashed—a variance from normal banking practice. The bank's proof department was instructed that the teller's cash stamp was unnecessary on the School District checks (IV, 1003, 1011–1016, 1154, 1159). The checks drawn against District funds and payable to fictitious persons total over $122,000 (X, 3349, Govt. Ex. 9).

Mr. W. M. Benson, who for many years was both petitioner Parr's accountant and the auditor for the School District, and Mr. Diego Heras, who was the "acting secretary" of the District until July 1951, testified as to the beginnings of the scheme.* Sometime in late 1948 or early 1949, Heras gave Benson

*Since the statute of limitations had run as to all substantive offenses committed prior to September 1, 1951, the testimoney of both Benson and Heras was admitted only to show the origin of the scheme and the fact that the continuing conspiracy began before the September date. The trial judge gave the jury appropriate instructions to that effect (XV, 5505).

a bundle of B.I.S.D. checks made out to various payees and asked him to cash the checks and give the money to petitioner Parr. Benson left the checks with petitioner Donald at the Texas State Bank and returned some fifteen minutes later to pick up a sealed envelope which he took back to Parr at Parr's office in San Diego. On a later occasion Benson was given a similar envelope by Heras and told to give it to Parr. Believing that the envelopes contained money, Benson asked Parr "about it and he said it wasn't his income, that he had some money for political expenses" (VII, 2321, 2325; X, 3308–3309).

As Heras remembered the situation, the practice of cashing bundles of School District checks began in 1948. Initially, petitioner Parr (or perhaps Benson, after conferring with Parr) came to Heras, gave him a list of names next to which certain amounts were set out, and instructed him to prepare checks for those persons. Heras prepared the checks drawn on a School District account, signed them, secured the necessary countersignature of Benson,[6] and took the checks to Parr (VII, 2320–2321, 2325, 2329–2330, 2340–2350). As noted, *supra*, p. 11, the practice was repeated at regular intervals.

In July 1951, the School District books, at Parr's direction, were moved from San Diego to Benavides. From this date, Heras neither signed nor typed any B.I.S.D. checks, and no longer had any access to the mail received. Even though he was not popular with

[6] Parr began personally countersigning School District checks in June 1950 (X, 3309–3310).

petitioners, his full time employment was not totally terminated until December 1952, because he was the only one who knew how to keep the property rolls (IV, 976–979; VII, 2320–2321, 2390–2391; 2321, 2360–2361, 2367–2368).

On November 1, 1951, Mrs. Ray took Mr. Williams' place in the teller's cage closest to petitioner Donald's desk. From then until early 1954, Donald came to her from time to time with bundles of checks drawn on the various payees, for which she gave cash to Donald (IV, 1154, 1155–1159). In cashing the bundles of B.I.S.D. checks, Mrs. Ray dealt only with Donald, never with anyone else (IV, 1156, 1155–1158). Nunley, note teller at the petitioner Texas State Bank, testified that, after the middle of 1951, Heras' visits to Donald stopped, but the visits of petitioner Oscar Carrillo, who at that time began signing B.I.S.D. checks, increased noticeably in number. Petitioner Carrillo went to Donald's desk (VI, 1932–1934).

Petitioner Saenz maintained an account at the Hebbronville Bank, in which were deposited during the years 1951, 1952 and 1953 numerous checks from the B.I.S.D. drawn to 8 different payees (Govt. Ex. 110-A–AA:A). These microfilmed checks are listed on the annual reports (Govt. Exs. 2–5) and graphically illustrate the operation of the fictitious check method. They establish not only that Saenz himself received regular periodical payments from the B.I.S.D., but that, after June 1950, the countersignature is that of George B. Parr on every check until late 1953. After July 1951, the signatures as makers are those of petitioners Saenz and Oscar Carrillo. The countersig-

nature of W. M. Benson does not appear after June 1950, and no signature of Diego Heras appears after June 1951 (Govt. Ex. 110).

b. *Checks drawn for services never rendered or materials never delivered.*—Other checks were drawn against School District funds for services never performed or materials never delivered (III, 740–742; Govt. Ex. 10). Often, these checks were made payable to names which were paraphrases of the names of teachers actually employed. Other checks were made payable to living persons, but were not received or cashed by the payees (III, 841–858; IV, 1191–1196; V, 1202–1209, 1231, 1235, 1237, 1239–1241, 1257–1258, 1262, 1264–1269, 1272, 1283–1285, 1291, 1294, 1299, 1305). One check for $584.45 for services was made payable to an eleven-year-old school boy (V, 1262–1263). Checks for service never rendered or materials never delivered, not duplicating the checks payable to fictitious persons, totaled more than $67,000 (X, 3350; Govt. Ex. 10).[10]

Saenz, Garcia, Garza, Oliveira and Chapa were on the regular payroll of the B.I.S.D., under one or more fictitious names or under their own names for fictitious services.[11]

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[10] These check totals are derived from specific checks, each established individually by the government as being fictitious in payee or purpose. The budgetary figures referred to *supra*, pp. 7–9, suggest that a much larger portion of the School District funds was directed to non-school purposes.

[11] These checks were often issued consecutively. For example, in the annual report for October 30, 1951 (Govt. Ex. 4), under the Local Maintenance Fund, Check No. 30109 was for $100 payable to Oliveira. C. G. Carrillo, E. M. Saenz, and R. Garcia follow in sequence. For another example see December

Petitioner Saenz, from 1949 through 1952, regularly deposited in his personal bank account certain School District checks drawn to eight different payees, seven named Saenz (with varying initials) and one named Sanchez. Most of the checks were for one hundred and twenty-five dollars. All were endorsed by petitioner Saenz (V, 1542–1543, 1547, 1550, 1567, 1570; VIII, 2406–2409; Govt. Ex. 110).

Petitioners Garza and Garcia received regular monthly checks drawn on School District funds and made payable to their respective daughters, both of whom were in school away from Benavides (III, 719, 740–742; VIII, 2402–2405; X, 3540–3543, 3553–3554, 3570–3574).[12]

From 1950 until the middle of 1952, petitioner Oliveira received a monthly salary of $100 from the School District for services which he never performed (IV, 957; VII, 2002–2003, 2073–2074; Govt. Exs. 1, 2, 4, 10).[13] In mid-1952, the salary ceased but Oliveira's

1952, when check No. 32019 was drawn to Mrs. C. L. Carrillo, followed by Matilde Garza, Amelia Canales, D. C. Chapa, Oliveira Implement Company, L. A. Sanchez, R. E. Saenz, M. E. Garza, and M. L. Garcia. The Sanchez, Saenz, Garza, and Garcia checks were all for $125 (Govt. Ex. 5). Amelia Canales was the maiden name of Mrs. Adolfo Barrera, a Benavides school teacher who did not use her maiden name. She did not receive this Canales check or any of the other 12 checks drawn payable to "Amelia Canales" (V, 1282–1285).

[12] Garcia became a member of the Board of Trustees shortly after February 10, 1953, succeeding his father, Mr. C. G. Ramirez (III, 859, 861; IV, 905, 968). However, a monthly check was issued in the name of Garcia's daughter for years before Garcia became a formal member of the Board (VII, 2410).

[13] Although Oliveira was understood to be one of the wealthiest men in Benavides, owning a ranch, two retail businesses, and

implement company began receiving regular monthly checks ranging in amount from $99.31 to $102 for alleged janitorial supplies which were never delivered (VII, 2004–2008; Govt. Ex. 222).

Petitioner Chapa regularly received three School District checks each month (VII, 2395–2400). Parr's brother-in-law, Mr. B. G. Moffett, received $500 per month from the B.I.S.D. for several years, although he did not perform any services for the District (V, 1418–1422).

c. *Checks received from taxpayers which were diverted before deposit in School District accounts.*— On many occasions checks received through the mails in payment of taxes were cashed for petitioner Chapa at the local Benavides bank or at the petitioner San Diego State Bank. At the Benavides bank, this was usually done weekly, or every other week, and the money returned to Chapa (V, 1581–1590). Among those so cashed were the following: A Texas Eastern Production Company check for $6,525.35 cashed on October 23, 1953; a Pan American Production Company check, dated September 25, 1952, for $2,548.29; an Ibex Company check, dated October 30, 1953, for $5,261.10; a Calvert and Manley check, dated October 11, 1953, for $3,298.25; a Ralph E. Fair, Inc. check, dated September 26, 1952, for $6,179.58; and a Rodney De Lange check for $1,591.24, cashed on December 16, 1953 (X, 3586–3587; XI, 3624–3634). Some of these checks bore the endorsement of Oscar Carrillo, Sr.

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other rental property, he claimed that the payment from the District was for personal services as a night watchman (IV, 907, 924; VII, 2001–2003).

(XI, 3641–3644). No cash was ever deposited in the School District accounts in 1952 or 1953 (VI, 1888–1897; Govt. Exs. 85–87).

Petitioner Chapa maintained a bank account at the petitioner San Diego bank and also secured loans from that institution. On October 5, 1953, four taxpayers' checks totalling $5,243.22 were processed through the San Diego bank, instead of the lawful depository bank. That same day $499.82 was deposited in Chapa's personal account and his loan account was reduced by $4,643.43, a total credit to him of $5,143.22. On October 14, 1953, taxpayers' checks totaling $2,682.90 were put through the bank and Chapa's indebtedness was reduced by $2,980 that same day (VI, 1690–1693, 1756–1758).

There was evidence that properties had been left off the tax rolls in 1953, with special tax notices and receipts sent to these taxpayers (VI, 1653–1660; VII, 2195–2207; Govt. Ex 34). The properties, represented by all four taxpayers' checks cashed by Chapa on October 5, do not appear on School District tax rolls for 1953. The same is true of two of the four checks cashed by him on October 14 (V, 1337–1338, 1347–1348, 1351–1352, 1357–1364, 1370–1372, 1386). Uncontradicted expert handwriting testimony established that the signature on the special series of tax receipts covering properties not listed on the tax roll was that of petitioner Chapa (XI, 3807–3819). A rough total valuation for the property omitted from the tax rolls in 1953 may be obtained by comparing the Board of Equalization figures with the completed tax rolls. In 1953, the Board of Equalization's final valuations

totaled $30,059,470 (Govt. Ex. 225). Petitioner Chapa's final tax rolls, however, showed total valuations of $29,692,573 (Govt. Ex. 34), a difference of $366,897.

d. *Use of School Board funds for personal purposes.*—The School District had a Conoco credit card and an open account at the Conoco Service Station in Benavides. During 1951, 1952 and 1953, petitioners Oscar Carrillo, Sr., and Garza regularly obtained gasoline and other supplies for their personal use and had the purchases charged to the School District (V, 1454–1459, 1490–1504, 1516–1518, 1536–1542). The purchases were paid for by the District in due course (V, 1423–1430).

Petitioner O. P. Carrillo remodeled and equipped his law offices in September 1952, at the expense of the School District. The District paid $582.81 for building materials used in the course of the work (VI, 1798–1809) and $1,094 for Carrillo's office furniture (VI, 1877–1880), although the Board of Trustees had not authorized this expenditure (IV, 956).

B. THE USE OF THE MAILS CHARGED IN THE INDICTMENT

We have summarized *supra* the evidence showing that the District's operation was geared to the collections of funds by mail and that the source of 75% to 85% of the funds diverted was tax payments received from non-resident holders of mineral rights (X, 3323). Here we set forth the facts with respect to the particular mailings on which the various counts of the indictment were based.

a. COUNTS 1–6

On or about July 21, 1952, the Humble Oil and Refining Company received, at Houston, Texas, a letter from the B.I.S.D. Board of Equalization (signed by petitioner Oscar Carrillo, Sr.) giving notice of a hearing to consider raising the value assessment of Humble property within the District. The Humble Company issued a check to the District, dated September 26, 1952, for $43,166.07 to pay its taxes for that year, mailed it together with a letter of transmittal and received a receipt by mail in return (Counts 1, 2, 3; XI, 3727, 3732, 3740, 3749).

Humble received another similar letter from the Board of Equalization on May 27, 1953. It sent a check for $53,807.35 and a letter of transmittal by mail on September 24, 1953, again receiving a receipt from the B.I.S.D. by mail (Counts 4, 5; XI, 3728, 3732, 3750).

Count 6 relates to the payment of property taxes by the Humble Company on September 25, 1951, in the amount of $34,285.09, also by mail (XI, 3726–3727, 3749).

b. COUNTS 7–10

Counts 7, 8, 9, and 10 deal with property tax payments made by the C. W. Hahl Company, Houston, Texas, to the B.I.S.D. in 1951, 1952 and 1953, and a letter received by the company from the District on December 3, 1952. All of these transactions were carried on by mail (XI, 3755–3761).

c. COUNTS 11–14

The Texas Company, with offices in Houston, Texas, also held substantial property within the District. On September 28, 1951, it paid property taxes amounting to $13,532.64 (Count 11; XI, 3706–3708); on September 26, 1952, its payment was $13,078.72 (Count 12; XI, 3708–3709); and on September 30, 1953, it paid $14,665.04 (Count 13; XI, 3709–3710). The Texas Pipe Line Company paid property taxes of $330.84, on September 30, 1953 (Count 14; XI, 3710–3711). All of these payments were made through the mails.

d. COUNTS 15–16

Mr. J. E. Beall's payment of property taxes by mailed checks was the subject of counts 15 and 16. One of these checks, dated October 24, 1952, was rubber-stamped by the Tax Collector-Assessor, endorsed by one of Chapa's office employees, Romero Morin, cashed at the local Benavides bank, and the money returned to petitioner Chapa (V, 1336–1341; XI, 3640; V, 1588–1590; Govt. Ex. 33). The other was used to reduce petitioner Chapa's note liability at the San Diego bank on October 14, 1953 (V, 1338, VI, 1693; Govt. Ex. 44). Two of the checks so used along with the Beall check represented taxes on property left off the 1953 rolls, for which the special tax receipts, signed personally by Chapa, were given (Govt. Exs. 55A, 55B, 58A, 58D; XI, 3807–3819).

e. COUNTS 17–19

The mails were also used in paying the Continental Oil Company for the products which two of the pe-

titioners had obtained for their personal use but charged to the District (see *supra*, p. 19). In March 1953, Continental billed (Count 19; V, 1424–1425) and was paid for such purchases (Count 18; V, 1429). In June 1953, it again billed the District (Count 17; V, 1426).

C. THE TERMINATION OF THE CONSPIRACY

In January 1954, Mr. W. D. Main, a postal inspector, was investigating the use of the mails by the B.I.S.D. Working from the annual reports filed with the Texas Education Agency, he attempted to determine whether the persons named as payees on District checks actually existed (VI, 1978–1979; VII, 2008, 2047). Since he was unsuccessful in locating many of the payees, Mr. Main and a fellow inspector went to the School District office in Benavides, Texas, on January 24, 1954, where they met petitioner Chapa and asked for permission to inspect the District records (VI, 1981–1983). After being referred to petitioners Saenz and Oscar Carrillo, Sr., Mr. Main was finally permitted on February 5, 1954, to inspect a portion of the minutes of meetings of the Board of Trustees (VI, 1986, 1990–1993, 1995).[14] Although a search was specifically made for cancelled checks and bank statements for the fiscal years 1950–1953, no records for months prior to October 1953, could be found (VI, 1996–1998).[15]

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[14] It was the practice to delete from the minutes all references to petitioner Parr (VII, 2388).

[15] At least 210 fraudulent checks were drawn against School District funds after September 1, 1951, and listed on the annual reports (Govt. Exs. 9, 10). Only 3 of the original checks were

About February 1, 1954 (within a week after inspector Main's second unproductive interview with petitioners Chapa and Oscar Carrillo), petitioners Parr and Chapa contacted two local Benavides residents, Mr. Joe Vaello and Dr. J. C. Gonzales. They asked Gonzales to accept appointment as a School District trustee and asked Vaello to accept the position of county judge, in the event it became necessary for the respective incumbents to resign (III, 832–836). Both declined the offered positions, but Vaello agreed to serve on the School Board. On February 10, 1954, all four Benavides trustees (Saenz, Garcia, Garza, and Barton), the Tax Assessor-Collector (Chapa), and the Secretary (Oscar Carrillo, Sr.) resigned. The trustees were replaced by Mr. Vaello and three other persons chosen by him (III, 837–841).

Other federal agents were also conducting an investigation in Duval County in February 1954 (VII, 2011–2012). On February 16, 1954, Mr. William A. Dimler, an agent of the Internal Revenue Service, went to the petitioner San Diego State Bank, intending to examine certain of the bank's records (VI, 1952). Although the bank had microfilmed its checks, deposit slips, and other important records since 1948,

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ever found among District records (Govt. Exs. 107, 108, 109 A). All three of these checks were issued on December 22, 1953. In addition, Diego Heras took twenty checks, countersigned by petitioner Parr, from the District office in late 1952 and later delivered them to law enforcement authorities (VII, 2355–2357; Govt. Exs. 17 A–P, 18–21). Sixteen of these checks were payable to wholly fictitious persons (IV, 1021–1023; VII, 2335–2341); the other four were for services never rendered or materials never delivered (V, 1230–1231, 1239–1240, 1257–1258).

all of the microfilms for the years 1948 through 1953 were missing (VI, 1699–1701, 1956). The microfilms disappeared sometime between February 1 and the week of February 15, 1954. No other significant item was missing and there was nothing to indicate that either the microfilm vault or the building itself had been forcibly entered (VI, 1700–1702).

The following day, February 17, 1954, agent Dimler went to petitioner Texas State Bank and asked to see its retained records. He was informed by petitioner Donald that the microfilm records of canceled checks for the years 1949–1953 had been destroyed (VI, 1947–1950). There was evidence to indicate that the records had not been removed from the bank or destroyed until after Dimler's visit. Mrs. Jo Baker, who often logged in and filed the films when they were returned after processing, discovered that the microfilms were missing on the morning of February 18, 1954. She also noticed that the contents of three large cardboxes had been dumped on the storeroom floor and that the boxes were missing (VI, 1965–1967). The bank's logbook (Govt. Ex. 106) shows that a spool of processed film was filed on February 17, 1954, but there was no report of anything missing until Mrs. Baker's discovery the following day (VI, 1977). Several months later, petitioner Donald told an agent of the Federal Bureau of Investigation that the microfilms for the period October 1948 to January 1, 1954, had unaccountably disappeared during the week of February 8, 1954 (VI, 1961–1963). Donald did not report it to the police, the sheriff, the FBI, or to bank examiners, either state or federal.

SUMMARY OF ARGUMENT

I

The indictment charged, and the proof showed, that petitioners violated the mail fraud statute.

A. 1. The basic purpose of the mail fraud statute is to prevent the federally-created and operated mail service from being used in the execution or furtherance of fraudulent schemes, whether or not Congress can forbid the scheme itself. It is therefore immaterial that the scheme charged involves a transaction forbidden by state law, or that the defrauders are public officials rather than private citizens. The crucial question is not whether petitioners' activities could have been punished as embezzlement under local law, but whether, as the facts in this case show, the use of the mails violated federal law because it was in furtherance of petitioners' fraudulent activities.

2. This Court and the lower courts have taken a broad view of the nature of the mailings that may be said to be in execution of a scheme to defraud. A material false statement contained in a document sent through the mails clearly constitutes a fraudulent misrepresentation in violation of the statute. Beyond that, the matter mailed need not be fraudulent in itself; it is enough that it somehow aids in the execution of the fraudulent scheme. Thus, particular mailings may be in execution of the scheme to defraud even though they are legitimate on their face, and relate to a transaction which is itself proper, if that transaction serves to advance the fraudulent scheme as a whole.

B. 1. Under Texas law, petitioners were obligated to spend all public school funds, whether collected

through local taxes or from the State, for specified school purposes. Instead, they systematically looted the School District over a period of years. Such legitimate expenditures as were made helped to mask the fraud.

2. The scheme to defraud not only contemplated the use of the mails, but actually depended on the mails for its success. Petitioners were able to carry on and conceal their scheme for so long primarily because three out of every four dollars of tax revenue came by mail from non-resident oil operators who paid taxes to many school districts, necessarily dealt with them by mail, and were unlikely to check on the nature of local expenditures. The evidence shows that the apparatus for collecting taxes was captured and subverted by the petitioners for the purpose of executing a scheme to defraud. So long as the scheme continued, its success depended upon the use of the mails. For the scheme could not have continued unless the tax money kept coming in, and the money kept coming in, and was expected to come in, through the mails.

3. Many of the mailings themselves contained false representations. The tax notices and receipts mailed to taxpayers impliedly represented that all purported school expenditures were lawful, and that all school funds were, and would be, used for school purposes. That representation was plainly false. The tax bills caused the mailing of the checks alleged in counts 3, 4, 6, and 8–16 as substantive offenses, and alleged in count 20 as overt acts of conspiracy. The same representation was implicit in letters sent by the secretary of the board relating to proposed increases in

assessed valuation (counts 2, 5) or explaining an assessment to a taxpayer (count 7). And the tax receipt containing this misrepresentation (count 1) served to lull the victim into inaction.

Petitioners' contention that the use of the mails would have taken place whether or not the fraudulent scheme had been in existence overlooks the fact that, absent the scheme, the tax bills, checks, letters, and receipts sent through the mails would almost certainly have been different. The portion of the tax rate reflecting service of the District's bonded indebtedness rose steeply during the period of the scheme, and part of this rise was attributable to the fact that there were new bond issues that enabled petitioners to take $120,000 from the building funds for their own purposes. Similarly, the charge for local school maintenance might have been less if petitioners had not taken $70,000 from the maintenance funds during the period of the scheme. Mail fraud prosecutions are not limited to cases where the victims get nothing for their money; the mail fraud statute also covers cases where the value of what the victims receive is less than it was represented to be.

4. Counts 15 and 16 involve mailings in which specific monies were misappropriated by petitioners. One was a taxpayer's check used to reduce petitioner Chapa's bank note liability (count 15); the other was such a check cashed by him personally (count 16). As to these two counts, just as in *Pereira v. United States*, 347 U.S. 1, the very object of the fraud—the check for the money which was misappropriated—was the object transported by mail.

II

Diego Heras was one of 73 government witnesses. After his direct testimony was concluded, the defense sought production of his testimony before the grand jury that returned the indictment. The government opposed the demand, the trial court denied production, and the court of appeals affirmed. Although those proceedings were conducted on the assumption that a transcript existed of Heras' grand jury testimony, shortly before this Court granted certiorari the government discovered that his testimony had not been recorded, and it so advised the Court.

The documents set forth in Appendix A to this brief establish that the testimony of Diego Heras and three other witnesses before the grand jury (W. D. Main, Dorothy Forbes, and Jose Tovar) was not recorded by a court reporter. Accordingly, any question with respect to whether a transcript of Heras' testimony should have been turned over to the defendants at trial is moot. Petitioners obviously have no claim to a non-existent document. The only issue properly before this Court, therefore, is whether the government's failure to make a transcript of Heras' grand jury testimony was erroneous.

A. The government was not required to transcribe Diego Heras' grand jury testimony.

1. As petitioners themselves concede, the taking of a transcript of grand jury testimony lies within the discretion of the prosecutor. Rule 6(d) of the Federal Rules of Criminal Procedure, providing that a stenographer may be present to record the testimony heard by the grand jury, is cast in permissive, rather

than mandatory, language. The draftsmen of the Rules intended that the stenographic record of that testimony would belong to, and primarily benefit, the United States Attorney. The Advisory Committee also knew that, except for the federal districts in New York, it was not the practice in most federal districts to make a verbatim transcript of evidence received by the grand jury.

2. There is no basis for, and the government unequivocally denies, petitioners' charge that the United States Attorney refrained from having Diego Heras' grand jury testimony recorded because he wished to minimize impeaching material that might otherwise be available to the defense at trial. Heras was not singled out as a dubious witness whose testimony, if transcribed, might subsequently prove embarrassing to the government; the testimony of three other witnesses before the grand jury, including a postal inspector, was also not recorded.

The prosecutor had valid reasons for not recording Heras' jury testimony. When Heras testified the case was already well developed; the indictment was returned that same day. The prosecutor already knew what Heras' testimony would be, since Heras had made many statements to government agents and testified before a federal income tax grand jury, where his testimony was recorded. Furthermore, his testimony related only to the background of the scheme and not to any offenses unbarred by the statute of limitations.

Moreover, the indictment in this case was returned before *Jencks* v. *United States*, 353 U.S. 657, was de-

cided. It was only after that decision that widespread demands were made for the production of grand jury transcripts. Thus, when Heras appeared before the grand jury the prosecutor had no reason to suppose that production of a transcript of his testimony there would be sought at the trial. The claim that the prosecutor was deliberately attempting to suppress material favorable to the defense is further refuted by the fact that he willingly turned over to defense counsel prior statements made by government witnesses that were clearly not within the rule of *Jencks*. Finally, there is no basis for the charge that the government knew, or anticipated, that Heras would be an unreliable witness. As it turned out, he was not.

2. Assuming *arguendo* that the government's failure to record Diego Heras' grand jury testimony was erroneous, petitioners were not prejudiced thereby. For, under the test recently enunciated in *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, petitioners were not entitled to the transcript, since they sought it as of right and without attempting to show any "particularized need" therefor. They sought the transcript at the conclusion of Heras' direct examination. They were given, and made extensive use of, 16 prior statements of the witness. Even after subjecting Heras to searching and protracted cross-examination, which they now claim revealed numerous inconsistencies with his prior statements and testimony, petitioners did not renew their request for the transcript, or even ask the trial to examine it for possible inconsistencies.

3. Petitioners now claim, however, that they had a need for the transcript because (a) Heras was the key prosecution witness, and (b) there were numerous discrepancies and contradictions between his trial testimony and his previous statements. The record refutes both of these contentions—neither of which, significantly, was offered as a reason for production in the trial court.

a. There was no single key government witness; the government's case was established by 73 witnesses and over 200 exhibits. Heras' testimony was admitted to show only the background of the scheme, and was so limited by the trial judge. Moreover, Heras' testimony was amply corroborated.

b. The court of appeals stated (XVII, 5830) that "[n]umerous inconsistencies and contradictions" between Heras' trial testimony and his "prior statements and testimony" were inquired into by petitioners' counsel during cross-examination, and that Heras admitted "[s]ome inconsistencies and discrepancies * * * including an admission that he had sworn falsely in previous affidavits." The record shows, however, only one instance in which Heras made inconsistent statements, and these were not inconsistent with his trial testimony, but only with each other. The prior statements made by Heras which were used by defense counsel on cross-examination (but which were not before the court of appeals) show that the other alleged "inconsistencies and contradictions" involved merely suggestions of inconsistency made by defense counsel during cross-examination, and that in fact there are no such inconsistencies. There is thus

no foundation for petitioners' present sweeping claim that Heras' trial testimony was shown to be untrustworthy and perjured.

ARGUMENT

I

THE INDICTMENT CHARGED, AND THE PROOF SHOWED, THAT PETITIONERS VIOLATED THE MAIL FRAUD STATUTE

Petitioners challenge their conviction under the mail fraud statute on the ground that the "use of the mails here had nothing to do with any scheme of embezzlement" (Br. 27). They contend that "the case involved a state offense of embezzlement of local school funds by trustees of a local school district and others" (Br. 3; see Br. 26); that the mails were not used "as an incident of effectuating or concealing the scheme * * * [and] would have [been used] whether or not the scheme existed" (Br. 27); and that the "scheme would have been effected even if there had been no mailing whatever" (Br. 26).

Petitioners' arguments rest upon a basic misconception of what is necessary to establish a violation of the mail fraud statute, and upon a faulty analysis of the proof in this case. As we shall show, the broad reach of the mail fraud statute prohibits any use of the mails in the execution of any scheme to defraud; and it is immaterial that the fraudulent scheme also may violate local criminal laws (as most such schemes do) or that the particular mailings in furtherance of the scheme are not otherwise illegal. For the mail fraud statute was passed "with the purpose of protecting the public against all such intentional efforts

to despoil, and to prevent the post office from being used to carry them into effect" (*Durland* v. *United States*, 161 U.S. 306, 314). We shall further show that the use of the mails in this case was an integral part of, and essential to, the successful operation of the whole scheme; and that the particular mailings charged in the indictment were in furtherance of the scheme.[16]

A. THE MAIL FRAUD STATUTE IS VIOLATED BY ANY USE OF THE MAILS IN THE EXECUTION OF A SCHEME TO DEFRAUD, EVEN THOUGH (1) THE SCHEME ALSO VIOLATES LOCAL CRIMINAL LAWS AND (2) THE MATTER MAILED IS ITSELF INNOCENT

1. The basic purpose of the mail fraud statute is to prevent the federally-created and operated mail service from being used in the execution or furtherance of fraudulent schemes. *Durland, supra.* Almost 90 years ago Congress first forbade the use of the mails to execute a scheme to defraud,[17] and this basic pro-

[16] Throughout their brief, petitioners frequently contend (*e.g.*, pp. 19, 21, 26, 31, 32, 33, 34) that the allegations in the indictment do not charge violations of the mail fraud statute. The indictment, however, basically follows the language of the statute. It first sets forth in detail the scheme to defraud (Count 1), and then charges 19 specific uses of the mails that were made "for the purpose of executing" the scheme (I, 17–27). Plainly, this adequately charged violations of the statute; the only question is whether the proof shows, as the indictment alleged and the jury found under the specific charge of the trial court (XV, 5502), that the mails were used in execution of the scheme.

[17] The Act of June 8, 1872, c. 335, Sec. 301, 17 Stat. 323 (R.S. § 5480) provided:

"That if any person having devised or intending to devise any scheme or artifice to defraud * * * shall, in and for executing such scheme or artifice (or attempting to do so), place any letter or packet in any post-office of the United States, or

hibition, although broadened in scope,[15] has continued to this day. It now provides (18 U.S.C. 1341):

> Whoever, having devised or intending to devise any scheme or artifice to defraud * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing * * * [or causes such matter or thing to be delivered as addressed] shall be fined * * * or imprisoned * * *.

Since the thrust of this statute is against using the mails in furtherance of a fraudulent scheme, "[i]t is immaterial * * * that the scheme charged involved a transaction forbidden by the laws of the state." *United States* v. *Sylvanus,* 192 F. 2d 96, 100 (C.A. 7), certiorari denied, 342 U.S. 943; *O'Hara* v. *United States,* 129 Fed. 551, 555 (C.A. 6). For Congress "may forbid any such acts [of mailing] done in

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take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty * * *."

[15] In 1889, Congress enumerated certain types of mail order swindles, added dealing in counterfeit money to the "scheme to defraud" portion of the statute, and included other types of mail matter and other authorized mail depositories. Act of March 2, 1889, c. 393, Sec. 1, 25 Stat. 873.

The Act of March 4, 1909, c. 321, 35 Stat. 1130, made significant changes. The statute was extended to reach not only schemes to defraud and dealing in counterfeit money, but also "obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

The language of the section was extensively revised in 1940 (18 U.S.C. (1940 ed.) 338), but the revisors noted that there was no intent to change its meaning. It was renumbered as 18 U.S.C. 1341 in the 1952 revision.

furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not" (*Badders* v. *United States*, 240 U.S. 391, 393), and whether or not the states have forbidden it. See *In re Rapier*, 143 U.S. 110, 134, holding that Congress may forbid the use of the mails to conduct a lottery, whether state laws authorized or forbade such activity. The crucial question in this case, therefore, is not whether petitioners' activities could have been punished as embezzlement under local law, but whether their use of the mails violated federal law because it was in furtherance of their fraudulent activities.[19] As we show, it clearly was.

Similarly, if the mails are used in execution of a scheme to defraud, it is immaterial that the defrauders are public officials rather than private citizens. *Bradford* v. *United States*, 129 F. 2d 274, 276 (C.A. 5), certiorari denied, 317 U.S. 683; *Shushan* v. *United States*, 117 F. 2d 110, 115 (C.A. 5), certiorari denied, 313 U.S. 574; see *Steiner* v. *United States*, 134 F. 2d 931, 933 (C.A. 5), certiorari denied, 319 U.S. 774; *United States* v. *Leche*, 34 F. Supp. 982, 985 (W.D. La.), affirmed, 118 F. 2d 246 (C.A. 5), certiorari denied, 314 U.S. 617. These cases all involved public officials who were held to have violated the mail fraud

[19] The mail fraud statute is therefore significantly different from the prohibitions of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. 186, which in *Arroyo* v. *United States*, 359 U.S. 419, 425, were held not applicable to embezzlement by union officials, because "there was not the slightest indication that § 302 was intended to duplicate state criminal laws." The use of the mails in the execution of a scheme to defraud, which is the conduct penalized by the mail fraud statute, is a different offense from the scheme itself.

statute in carrying out schemes to defraud public bodies, in circumstances where the schemes also involved local crimes. In *Shushan,* for example, the fraudulent scheme, which involved bribery of a public official, was designed to induce a public body to approve a bond refunding plan under which exorbitant fees would be charged and then would be converted by the defendants. The use of the mails alleged was primarily in the paying and dividing of the fees. In upholding the convictions against the argument that no federal offense was involved, the court of appeals said, 117 F. 2d at p. 115:

> A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud though no lies were told. A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. * * *

In *Bradford, supra,* the court pointed out that the fact that bribery was shown "would not prevent it from also being part of a scheme to defraud the City, in the execution of which the mails were caused to be used."

2. In accordance with the view that the purpose of Congress was to prohibit the mails from being used in aid of fraud, the courts have taken a broad view of the nature of the mailings that can be said to be in execution of a scheme to defraud. Of course, a material false statement contained in a document sent through the mails (as was true of many of the mail-

ings in this case, *infra*, pp. 46–51) clearly constitutes a fraudulent misrepresentation in violation of the statute. Beyond that, the matter mailed need not be fraudulent in itself; it is enough that it somehow aids in the execution of the fraudulent scheme.

As early as *Durland* v. *United States*, *supra*, 161 U.S. 306, 315, this Court took pains to make clear that it would not sanction a narrow interpretation of the mail fraud statute. It said:

> We do not wish to be understood as intimating that, in order to constitute the offence it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they be absolutely ineffective therefor.

It is settled that mailings, innocent in themselves, may nevertheless be in execution of a scheme to defraud because of their relation to the whole scheme. *Holmes* v. *United States*, 134 F. 2d 125, 133 (C.A. 8), certiorari denied, 319 U.S. 776. For example, in *Mitchell* v. *United States*, 126 F. 2d 550 (C.A. 10), certiorari denied, 316 U.S. 702, the defendant sold gas and oil leases on the misrepresentation that an oil company which he represented would purchase them for a sum greatly in excess of the price paid, after the leases were recorded with the Commissioner of Public Lands. The specific uses of the mails charged were (1) a letter from the defendant to a lease broker ordering gas and oil leases; (2) the mailing of a lease

by the broker to the defendant for resale by the defendant; (3) the mailing of the lease by the victim to the Commissioner for recording; and (4) the return of the lease by the Commissioner to the victim after recording. None of these mailings was fraudulent in itself; indeed, the first two involved merely the purchase of leases by the defendant himself. Yet they were held to be in violation of the mail fraud statute because, in relation to the total picture, the mailings were a part of a continuing scheme to defraud.

In *Stephens* v. *United States*, 41 F. 2d 440 (C.A. 9), certiorari denied, 282 U.S. 880, the court made it clear that particular mailings could be in execution of the scheme to defraud even though they were not only legitimate on their face, but the particular transaction to which they related was itself proper. There the defendants had taken over a legitimate business but expanded it by illegitimate means, including false representations and deceptive practices. The defendants contended that the mailings which formed the basis of the substantive counts were not illegal because they were made in the promotion of the lawful features of the business, or at least that the evidence failed to show any connection between the mailings and those branches of the business which were promoted by deception. In overruling that contention the court said (41 F. 2d at p. 447):

> But direct connection was not requisite. The business was a single general enterprise, and a lawful activity in the course thereof might very well have made a material contribution to the success of another activity illegitimate

> in its purpose or fraudulent in the means used in carrying it forward. * * * If fraudulent in important and continuing branches of its activities, the enterprise as a whole may properly be characterized as a fraudulent scheme.

Where a scheme has wholly terminated, a subsequent mailing is not in execution of the scheme. *Kann* v. *United States*, 323 U.S. 88. But this does not affect the validity of the principles cited above—that, where mailings occur while the scheme is still in existence, the mailings must be judged, not in themselves, but in relation to the whole scheme in order to determine whether the mailings were in execution of the scheme. This has been reaffirmed since the *Kann* decision. In *United States* v. *Earnhardt*, 153 F. 2d 472 (C.A. 7), the scheme was to sell land on the fraudulent representation that it was in an oil-producing region and itself had potential value as oil land. The mailings relied upon consisted mainly of letters enclosing deeds either to purchasers, or to the county recorder for recording. The mailings were held to be in execution of the scheme since

> the scheme described was a general and continuing one, the object of which was to reach as many investors as possible. * * *. That, coupled with the fact that the indictment further charged that defendants sought to allay fears and apprehensions as to the safety of their investments in order to prevent possible action on their part, renders the mailings of the deeds essential steps in the execution of the scheme and not just unrelated events occurring

after its completion. * * * [153 F. 2d at pp. 473–474.]

In *Ahrens* v. *United States*, 265 F. 2d 514 (C.A. 5), defendant obtained money from his victim on the fraudulent representation that he could obtain a large business loan for the victim if the latter would pay him his expenses and a finder's fee. The indictment alleged violations of 18 U.S.C. 1343, which forbids the use of interstate wire communications for the purpose of executing a scheme to defraud. Three of the four specific telegrams relied upon in the four counts were sent by the defendant to acknowledge the receipt of money transmitted to him by the victim. As such, the telegrams were innocent in themselves, yet they clearly tended to further the relationship between the defendant and the victim, so as to have the way open for future requests for money. They were therefore held to be in execution of the scheme.

Under the teaching of these authorities, therefore, it is no defense to the mail fraud charges that the particular mailings involved were themselves otherwise lawful, *i.e.*, that they were merely the normal sending out of tax assessments, payment of taxes, acknowledgement of receipt thereof, and payment of commercial bills. For the question is not whether the mailings were themselves fraudulent (although, as we show *infra*, pp. 48–49, many of the mailings contained the implied misrepresentations involved in the scheme to defraud), but whether they were in execution of the fraudulent scheme.[20]

[20] Similarly, it is immaterial that petitioners themselves did not use the mails. It is sufficient that they caused the mails to be used in the execution of the scheme. See note 22, *infra*, p. 44.

B. THE USE OF THE MAILS WAS IN FURTHERANCE OF THE CONSPIRACY AND THE SCHEME TO DEFRAUD

1. *Petitioners were parties to a scheme to defraud.*—The fraudulent scheme charged was to defraud the taxpayers, the School District, and the State of Texas (I, 12). No claim is, or could be, made that fraud was not established as to these victims.

Under Texas law, the trustees of this independent School District were entitled to levy and collect an *ad valorem* tax for the maintenance of public free schools, and a second tax to provide an interest and sinking fund to maintain and retire bonds issued for school construction and equipment.[21] All available state and county school funds must be used for the payment or support of the salaries of professional educators and for fees in connection with the scholastic census. All local school tax revenues must be used for professional salaries, school construction, and school maintenance. "The public free school funds shall not be expended" for any other purpose. Vernon's Civil Statutes of Texas, Article 2827; *Madeley et al.* v. *Trustees of Conroe Independent School District*, 130 S.W. 2d 929; *Harlingen Independent School District* v. *C. H. Page & Bros.*, 48 S.W. 2d 983, 986–987.

The evidence shows that, instead of carrying out this obligation, petitioners used their positions secretly and systematically to loot the School District over a

[21] Vernon's Civil Statutes of Texas, Articles 2784e (Taxing power), 2757 (Incorporating independent school districts), 2758 (Election and organization of board of trustees), 2791 (Appointment of tax collector-assessors); see *Cadena et al* v. *Leslie et al*, 185 S.W. 367, with respect to the organization of the B.I.S.D.

period of years. Month after month and year after year, petitioners drew fraudulent checks against District funds, falsified records and the annual reports, collected taxes, issued bonds, and received state and county monies so they could steal once more, thereby enriching themselves. All that was done was done under the guidance and control of petitioner Parr, who originated the plan of action, directed its operation, and obtained the lion's share of the money diverted. See the Statement, *supra*, pp. 6–7, 12–13.

Parr usually exerted control of School District affairs through his lieutenant, petitioner D. C. Chapa, tax assessor-collector, although he directly participated in the school-board meetings at which important questions were decided. Most importantly, he controlled the petitioner depository Texas State Bank, personally and through his lieutenant, petitioner Donald. Thus, during the five years that the scheme was in operation, all the individual petitioners had the comforting assurance that not only were the school board and tax collector's office completely in their hands, but also that Parr's control of the two petitioner banks would prevent any embarrassing questions arising in that quarter. As we show, this could not have continued as it did except for the fact that the major taxpayers made their payments by mail and therefore were not in a position to check on expenditures. The fact that some new construction was undertaken, and that the school system was permitted to continue legitimate operations, facilitated the concealment of the fraud. The operation of the District was a single enterprise, "and a lawful activity in the course thereof might very well have made a material contribution to the success of another activity illegiti-

mate in its purpose or fraudulent in the means used in carrying it forward. * * * If fraudulent in important and continuing branches of its activities, the enterprise as a whole may properly be characterized as a fraudulent scheme." *Stephens* v. *United States*, 41 F. 2d 440, 447 (C.A. 9), certiorari denied, 282 U.S. 880; *Blue et al* v. *United States*, 138 F. 2d 351, 355, 362 (C.A. 6), certiorari denied, 322 U.S. 736.

2. *Petitioners' scheme to defraud contemplated, and its success depended upon, the use of the mails.* This scheme to defraud not only contemplated the use of the mails, it actually depended on the mails for its success. Petitioners were able to carry on and conceal their scheme for so long primarily because three out of every four dollars of tax revenue came by mail from non-resident oil companies and oil operators. These non-residents paid taxes to many different school districts, necessarily dealt with them by mail, and were unlikely—even unable—to check on the financial conditions of local school districts, the nature of local expenditures, and the causes behind high local taxes. The evidence shows a continuing scheme which could not have continued unless the money kept coming in. And the way the money kept coming in, as petitioners well knew, was through the mails.

The crucial question is not whether the mails would have been used had there been no scheme, but whether petitioners brought their scheme to fruition by using the mails. As we have shown (*supra*, pp. 33–40), the purpose of the mail fraud statute is to insure that the federal government in its operation of the mails does not lend its aid to fraud. If a person takes over a legitimate mail order business and uses that business to perpetrate a fraud, the mail fraud statute would

be violated, even though the original organization of the business was not fraudulent. See *Stephens* v. *United States*, 41 F. 2d 440 (C.A. 9), certiorari denied, 282 U.S. 880, discussed *supra*, pp. 38–39. So here petitioners took over a public enterprise geared to the use of the mails and used it to defraud the public.[22] Congress did not intend to permit the mails to be thus misused. As was said in *Looker* v. *United States*, 240 Fed. 932, 934 (C.A. 2), "Indeed, the most dangerous and reprehensible swindles usually consist in building a scheme of deception upon a foundation lawful per se."

This case, therefore, is significantly different from *Kann* v. *United States*, 323 U.S. 88, upon which petitioners rely (Br. 27–28). There the defendants obtained checks by fraud and cashed or deposited them in a local bank, and the mails were then used by the latter in collecting the checks. The Court held that the fraudulent scheme was consummated when the defendants cashed the checks at the local bank, so that the subsequent use of the mails by the bank in collecting the checks was not "for the purpose of executing the scheme" (p. 94).[23] In the instant case,

[22] Since taxes were customarily collected and paid by mail, petitioners "caused" the mails to be used when they gained control of the B.I.S.D. and subverted its lawful operations to their fraudulent purposes. A defendant causes the mails to be used, even though he does not himself use them, where their use is reasonably foreseeable. *United States* v. *Kenofskey*, 243 U.S. 440, 443; *Pereira* v. *United States*, 347 U.S. 1, 8.

[23] *United States* v. *Beall*, 126 F. Supp. 363 (N.D. Cal.), relied on by petitioners (Br. 26–27), has no application to this case. There the defendant had nothing to do with collecting, or causing the collection of, the money which he embezzled after it was received by mail by his employer. Moreover, no false representations were sent by mail in that case. See *infra*, pp. 46–51.

however, the "scheme was a continuous one," and "[u]nless money came in, the scheme would not and could not operate * * *. The collection of * * * [taxes] was an integral part of the continuous and operating scheme to defraud, and the mails were used to accomplish their collection." *Steiner v. United States, supra,* 134 F. 2d at pp. 933–934. As the court below stated (XVII, 5825–5826):

> The evidence which could be accepted by the jury as true showed a continuing scheme to maintain control over the finances of B.I.S.D. to make possible the continued collection of state funds and taxes and the illegal use of part of these funds for the benefit of the conspirators. There was ample basis for the jury to find that the use of the mails was in furtherance of the scheme and not after it had been fully effectuated.

For these reasons, this case is critically different from petitioners' hypothetical situations (Br. 24–25, 29–30) involving embezzlement by employees of funds that had been previously received by their employer through the mails. For in none of those situations was the use of the mails an essential element of the scheme, and theft unconnected with mailing, but merely following it, is not a federal offense. If, however, a doctor (Pet. Br. 29–30) directs his secretary to deposit the payments received in response to the bills in the petty cash, and the secretary, month after month and year after year, increase the amount of the bill so as to provide a margin for peculation in the petty cash fund, this would be a violation of the mail fraud statute since the mails, through which the payments were received, would be used to execute the scheme.

In sum, the evidence showed that the apparatus for collecting taxes was captured and subverted by the petitioners for the purpose of executing a scheme to defraud. So long as the scheme continued, its success depended upon the use of the mails. This case therefore falls within the distinction recognized in *Kann*, where this Court said (323 U.S. at p. 94):

> The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States* v. *Kenofskey*, 243 U.S. 440. Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated. * * *

Here, the use of the mails was both a step toward receipt of the fruits of the fraud and a means of concealment so that further frauds could be perpetrated. The mailings were therefore in execution of the scheme.

3. *The mails were used in making the implied misrepresentations that School Board funds would be used solely for school purposes.* Not only was the continuing use of the mails an essential element of the scheme, but many of the mailings themselves contained false representations. For both the reports mailed to the State of Texas and the tax notices and receipts mailed to taxpayers impliedly represented that all purported school expenditures were lawful, and that all school funds were used for school purposes.

The mailings to the State, while not the basis of substantive counts, are important as showing the im-

portance of the mails to the scheme as a whole and to the conspiracy charge (count 20).[24] Large sums of money were obtained by the District from the State of Texas, and the filing of complete annual statements regarding the District's financial operations was a prerequisite to obtaining this money. To the extent that these annual statements contained false entries, they were analogous to false financial statements sent through the mails to trade and credit agencies for the purpose of obtaining credit or a good credit rating. It has often been held, as to the latter, that such false financial statements amount to a scheme to defraud by false pretenses and representations. *United States* v. *Young*, 232 U.S. 155, 158; *Neubauer* v. *United States*, 250 F. 2d 838, 841 (C.A. 8), certiorari denied, 356 U.S. 927; *United States* v. *Bender*, 60 F. 2d 56, 57 (C.A. 2), certiorari denied *sub nom. Posner* v. *United States*, 287 U.S. 598; *Czarlinsky* v. *United States*, 54 F. 2d 889, 890–892 (C.A. 10); *Slakoff* v. *United States*, 8 F. 2d 9, 10 (C.A. 3); *Bettman* v. *United States*, 224 Fed. 819, 823–826 (C.A. 6), certiorari denied, 239 U.S.

[24] Count 20 charged that petitioners conspired "to commit the offenses against the laws of the United States which are fully described and set out in the first count of this indictment" (I, 27). Petitioners apparently suggest (Br. 11–12, 33) that, since Count 1 alleged only a single mailing, the conspiracy charged related solely to that mailing. But the "offenses" against the laws of the United States that are set out in Count 1 include the entire scheme and its various elements (Pars. 14–16, I, 12–17), including the general use of the mails in the execution thereof (Par. 16(d), I, 14). This use of the mails is particularized in the specific mailings charged in counts 1 to 19.

642; *Scheinberg* v. *United States*, 213 Fed. 757, 759 (C.A. 2).

The tax bills which caused the mailings of the checks alleged in counts 3, 4, 6, and 8–16 are essentially of the same character.[25] The representation that the funds received would be spent for school purposes was implicit in the levying and collection of taxes, since Texas law (*supra*, p. 41) required that tax money collected by the district be devoted to those purposes. That implied representation was plainly false. The same fraudulent representation was implicit in letters sent by the secretary of the board relating to proposed increases in assessed valuation (counts 2, 5) or explaining an assessment to a taxpayer (count 7). The receipt (count 1) sent by petitioners after receiving a tax payment tended "to lull the victims into a sense of security and inaction, * * *." *Marshall* v. *United States*, 146 F. 2d 618, 621 (C.A. 9); *Schaefer* v. *United States*, 265 F. 2d 750, 753 (C.A. 8). The fact that the fraudulent representations were merely implicit is immaterial, since "there may be a scheme to defraud [within the contemplation of the mail fraud statute] by other means than express false representations." *Shushan* v. *United States*, *supra*, 117 F. 2d 110, 115 (C.A. 5);

[25] Any one of the mailings alleged in counts 1–10 will support the entire sentences, since these specific mailings were also alleged to be overt acts of conspiracy (count 20). Those petitioners whose sentences were not wholly concurrent received concurrent sentences on counts 1–10 and 11–20, the sentences under the latter counts being consecutive to those under the former counts.

United States v. *Groves*, 122 F. 2d 87, 90 (C.A. 2), certiorari denied, 314 U.S. 670.

Petitioners' contention (Br. 26; see Br. 27) that "the use of the mails would have taken place whether or not the scheme had been in existence" overlooks the fact that, had there been no fraud, the tax bills, checks, letters and receipts sent through the mails would almost certainly have been different. The tax rate levied by the District during this period was the maximum rate permitted by Texas statute (Vernon's Civil Statutes of Texas, Section 2784e) but the amount of bonded indebtedness ($330,000) and the amount allocated to bond redemption and interest payments ($.15 per $100 of valuation) was relatively low at the beginning of the scheme (Govt. Ex. 1, pp. 134–136). If petitioners had not misused the funds and raised the bonded indebtedness through a $265,000 issue in 1949 (Govt. Ex. 1, p. 136) and a $362,500 issue in 1950 (Govt. Ex. 2, pp. 123–124), taxes might very well have been lower and the tax bills different in later years. From 1950 onward, $.50 per $100 of valuation was devoted to bond service and redemption (Govt. Ex. 2, p. 134; Govt. Ex. 4, p. 131; Govt. Ex. 5, p. 137), and a portion of this increase was attributable to the fact that petitioners took at least $120,000 from the various building funds for their own purposes during the life of the scheme (Govt. Exs. 9, 10). Similarly, petitioners have no basis for a claim that the charge for local maintenance would have been no different if they had not taken $70,000

from the maintenance funds during this period (Govt. Exs. 9, 10). Finally, if petitioners had not misappropriated such substantial sums from the District, the tax rate might have been lowered during the period of the scheme.

Thus, from the viewpoint of the taxpayers, the situation was that of persons who, through implied misrepresentations, were induced to pay more than the justified amount to obtain the school services which the District actually rendered. Mail fraud "[p]rosecution is not limited to cases where the victim gets nothing for the money or property which is taken from him." *Deaver* v. *United States*, 155 F. 2d 740, 744 (C.A. D.C.), certiorari denied, 329 U.S. 766; see *Reistroffer* v. *United States*, 258 F. 2d 379, 384 (C.A. 8); *Grell* v. *United States*, 112 F. 2d 861, 863, 865 (C.A. 8); *United States* v. *Rowe*, 56 F. 2d 747, 749 (C.A. 2), certiorari denied, 286 U.S. 554; *Busch* v. *United States*, 52 F. 2d 79, 82 (C.A. 8), certiorari denied, 284 U.S. 687; *Wilson* v. *United States*, 190 Fed. 427, 433–434 (C.A. 2), affirmed, 221 U.S. 361, and cases cited *supra*, p. 35. It also covers cases where the value of what the victims obtain is less than it was represented to be. *Ibid.*

Moreover, once petitioners had begun their diversion of funds, their continued collection of taxes and state aid on the implied representation that all of the monies would be spent for school purposes was "to repeat what though once true, had become false and was then known to be false. That is enough to constitute a 'scheme to defraud' within * * * [the mail fraud statute]." *United States* v. *Dilliard*, 101

F. 2d 829, 834 (C.A. 2), certiorari denied, 306 U.S. 635; *Zimmerman* v. *United States*, 171 F. 2d 790, 792 (C.A. 5), certiorari denied, 337 U.S. 941; see *United States* v. *Kyle et al*, 257 F. 2d 559, 562–563 (C.A. 2), certiorari denied *sub nom. Gardner* v. *United States*, 358 U.S. 927; *United States* v. *Monjar*, 147 F. 2d 916 (C.A. 3), certiorari denied, 325 U.S. 859. On this basis, too, the mailing of the letters and receipts was fraudulent in itself as well as in relation to the whole scheme. Thus, even on petitioners' own assumptions, their argument is without merit.[36]

[36] In the Louisiana cases discussed *supra*, pp. 35–36, the use of the mails to defraud a local governmental body was less closely connected to the succesful operation of the scheme than in the instant case. *Weiss* v. *United States*, 120 F. 2d 472, rehearing denied, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *Steiner* v. *United States*, 134 F. 2d 931 (C.A. 5), certiorari denied, 319 U.S. 774; *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Bradford* v. *United States*, 129 F. 2d 274, rehearing denied, 130 F. 2d 630 (C.A. 5), certiorari denied, 317 U.S. 683; *United States* v. *Leche*, 34 F. Supp. 982 (W.D. La.), affirmed, 118 F. 2d 246 (C.A. 5), certiorari denied, 314 U.S. 617; *Hart* v. *United States*, 112 F. 2d 128 (C.A. 5), certiorari denied, 311 U.S. 684. In *Weiss*, the scheme was to defraud the State by fraudulently increasing the price to be charged by contractors for the construction of a public building; the use of the mails was the sending by Weiss, an architect, of his architect's certificates. The certificates in turn justified the payment of inflated construction fees, just as these tax statements overstated the amount to be spent on schools. In *Leche*, the scheme involved the elimination of competitive bidding for highway equipment sold to the State, the paying of exorbitant prices for such equipment, and the granting of rebates on such purchases; the mails were used to send checks in payment of the purchases. Here again, the mails would also have been used to pay for the equipment if there had been no fraud. But since the mails were used in

4. The mailings charged in two counts involved specific moneys that were misappropriated.—Contrary to petitioners' repeated assertions (Br. 7, 10–11, 12, 19, 23, 26, 31, 32) that none of the 19 substantive counts represented specific monies which were embezzled or misappropriated, counts 15 and 16 do represent such funds.[27] Count 15 of the indictment relates to the check of J. E. Beall for the year 1953 (Govt. Ex. 44). That check was one of those taken by petitioner Chapa directly from the mail to the San Diego State Bank and applied to his indebtedness on October 14, 1953. Count 16 concerns the check of Mr. Beall for 1952 (Govt. Ex. 33), which was one of the checks cashed at the Merchants Exchange Bank for petitioner Chapa. As to these two counts, just as in *Pereira* v. *United States*, 347 U.S. 1, the very object

execution of the fraud, the court of appeals, in accordance with established precedents, found that the mail fraud statute had been violated.

[27] Either of these counts, or the conspiracy count (count 20), would support the concurrent sentences imposed on counts 11–20. Those sentences would also be supported by counts 17–19, which involve credit transactions with the Conoco Oil Company, where petitioners charged purchases to the school district and the company billed the District and received payment by mail. See *supra*, pp. 19, 21–22. Obviously these bills, which always are collected by mail, would not have been incurred except for the fraud on the School District. It was necessary that the statement and invoices be mailed to the District in order that payments be made for the fraudulently obtained materials; if payment by the District was not forthcoming, then the service station owner would have called on the recipients for payment and would have cut off petitioners' credit, preventing them from obtaining further supplies. While these particular uses of the mail were small in themselves, they were part of a continuing scheme by petitioners to use school board funds as their own.

of the fraud—the check for the money which was misappropriated—was the object transported by mail. The jury itself recognized this distinction. It convicted petitioner Donald on all counts except 15 and 16—presumably because the Beall checks were taken directly from the mails by Chapa and Carillo and cashed at the local banks, and thus did not go through Donald's bank. Although the jury was, as its verdict shows, convinced that Donald was involved in the overall scheme, it declined to hold him responsible for the direct misuse of the mails in those two instances.

To recapitulate: Far from being an extension of the mail fraud statute, this prosecution is well within the bounds of the legislation as interpreted by this Court and the lower federal courts. The use of the mails was not merely incidental, but was an integral part of the scheme. The mailings charged in the substantive counts—including those which do not represent direct theft from the mails—were in execution of the scheme because they were necessary to its fruition. Although it is immaterial whether the mailings would have occurred without the fraud as long as they were in furtherance of the fraud, petitioners erroneously assume that the mailings would have been the same even if the fraud had not occurred. The fact that there is no reported case exactly like this stems in large part from the unique situation which made the use of the mails so integral a part of this scheme—the fact that, contrary to most school districts, the major taxpayers were non-residents, had to pay taxes by mail, and had no real interest in community affairs.

The trial judge charged the jury that, in order to convict, it had to find that "the mails were in use for the purpose of effecting the scheme" (XV, 5502) and, as we have shown, the evidence fully supported the jury's verdict that they were so used. Since petitioners were thus found to have used the mails to perpetrate fraud, they violated the federal mail fraud statute.

II

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE DEFENSE ACCESS TO THE GRAND JURY TESTIMONY OF DIEGO HERAS

Diego Heras was one of 73 government witnesses. After his direct examination was concluded, the defense sought production of his testimony before the grand jury that returned the indictment. The government opposed the demand, the trial court denied production, and the court of appeals affirmed.

During colloquies between the trial court and counsel, the United States Attorney stated that Heras' grand jury testimony had been transcribed and that he had a copy of it in his office. The case was argued before the court of appeals on the assumption that the transcript was in existence, and the petition for certiorari and the government's brief in opposition similarly so assumed.

Shortly before this Court granted certiorari, the government discovered that Heras' grand jury testimony had in fact not been transcribed, and so advised the court in its Further Supplemental Memorandum. We there noted (p. 2) that the statement of the United States Attorney during the trial that he possessed a transcript of the testimony was in error;

that the statement was made during a colloquy concerning the production of out-of-court statements made by Benson, another government witness; that the United States Attorney had a transcript of Heras' testimony given on October 27, 1954, before a grand jury which returned an income tax indictment against petitioner Parr alone (see *Parr* v. *United States*, 351 U.S. 513); and that the United States Attorney simply had forgotten that Diego Heras' grand jury testimony on March 6, 1956, had not been transcribed.

Although petitioners now state (Br. 43) that they "do not question the good faith of the Solicitor General" in representing that no transcript of Heras' grand jury testimony exists, they further state (*ibid.*) that this "statement cannot be accepted by this Court as proof of the matter asserted." We have, therefore, set forth in Appendix A (*infra*, pp. 79–90) three documents that fully establish that Heras' grand jury testimony was not transcribed.*

An affidavit by Grant E. Perry, the court reporter who reported all sessions of the grand jury except that of February 7, 1956, states (on the basis of his examination of the original transcripts of the testimony of the witnesses who appeared, his personal records of the names of the witnesses whose testimony he recorded, and his notes) that he did not report the testimony of either Diego Heras or three other witnesses who appeared before the grand jury, namely, W. D. Main (who appeared on two days, January 23, and March 6, 1956, and whose testimony was not recorded on either day), Dorothy Forbes and Jose Tovar

* The original documents have been lodged with the Clerk of this Court.

(*infra*, pp. 79–85). An affidavit by John Leydens, another court reporter who reported the February 7 session of the grand jury which Perry did not report, states that the entry in the grand jury minute book for that day indicating that Heras did not then appear as a witness "is in accordance with my recollection of the matter" (*infra*, p. 86). These two affidavits are corroborated by the Grand Jury Assignment Book, a record of the United States Attorney's Office in Houston, which lists the witnesses who appeared before the grand jury. This document shows that Diego Heras and W. D. Main testified before the grand jury on March 6, 1956, but states: "no court reporter today" (*infra*, p. 89). The statement "no court reporter" also appears with reference to the testimony of Dorothy D. Forbes on January 25, 1956, and Jose Tovar on February 16, 1956 (*infra*, pp. 87, 89). The Assignment Book further shows that Grant Perry was the court reporter who was present at all sessions of the grand jury except on February 7, 1956, when the reporter was John Leydens (*infra*, pp. 87–89).

On the basis of these documents, we submit that there can be no question that Diego Heras' testimony was not recorded. Accordingly, any question with respect to whether a transcript thereof should have been turned over the the defendants at trial is moot, for petitioners obviously have no claim to a non-existent document. Even if this Court were to reverse and remand for a new trial, there would still be no transcript of Heras' testimony that could be turned over to the defendants. Indeed, all of the recent cases in which this Court considered the production at trial of a witness's prior statements or grand jury testimony

presuppose that the defense initially must establish that the material sought is in existence. *Palermo* v. *United States*, 360 U.S. 343; *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 400–401; *Jencks* v. *United States*, 353 U.S. 657, 672; *Gordon* v. *United States*, 344 U.S. 414, 418.

The only issue properly before this Court, therefore, is not whether petitioners should have been given the non-existent transcript,[29] but whether the government's failure to make a transcript of this witness's testimony was erroneous. We shall show (1) that that government was not required to transcribe Heras' grand jury testimony and (2) that, even assuming *arguendo* that failure to make such a transcript was erroneous, petitioners were not prejudiced thereby since they would not have been entitled to the transcript had it existed.

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[29] Petitioners state (Br. 45) that, had they known at the trial that Heras' grand jury testimony was not recorded, they would have "sought to determine the substance of [it] by other means," such as questioning the members of the grand jury. While interrogation of grand jurors may be permissible in certain limited circumstances, we submit that criminal defendants cannot summon grand jurors in an attempt to discover whether a witness' trial testimony is inconsistent with his grand jury testimony that was not recorded. In any event, a witness would have to be cross-examined at trial with respect to his grand jury testimony before such an inquiry should even be considered. Here, however, although petitioners subjected Heras to a protracted cross-examination, they made no inquiry as to whether his trial testimony was inconsistent with his grand jury testimony. Finally, petitioners' present claim must be evaluated in the light of the fact that, when they learned that there was no transcript of the grand jury testimony of the witness Benson (which testimony they also sought), they made no attempt to "determine the substance" of it "by other means."

A. THE GOVERNMENT WAS NOT REQUIRED TO TRANSCRIBE HERAS' GRAND JURY TESTIMONY.

1. As petitioners themselves concede (Br. 47), the taking of a transcript of grand jury testimony lies within the discretion of the prosecutor. Although the Court Reporter's Act (28 U.S.C. 753(b)) requires that a verbatim record be made of "all proceedings in criminal cases had in open court" and "such other proceedings * * * as may be required by rule or order of court * * *," Rule 6(d) of the Federal Rules of Criminal Procedure merely provides that a stenographer "may" be present while the grand jury is in session "for the purpose of taking the evidence." The Advisory Committee, which took the lead in drafting the rules, intended that this stenographer would be an employee of the United States Attorney "and not an employee of the court, like a court appointee", and that the stenographer's record would belong to, and be for the primary benefit of, the United States Attorney. Federal Rules of Criminal Procedure, with Notes and Institute Proceedings, New York University School of Law Institute—Proceedings, Vol. VI, p. 180. Furthermore, the Advisory Committee knew that, except for the federal districts in New York,[30]

[30] This unique practice in the New York districts of assigning stenographers to record and transcribe grand jury proceedings as a matter of course is perhaps attributable to the local New York state practice. By statute, New York grand juries have been obligated to keep minutes of the evidence given before them since 1827–1828. New York Code of Criminal Procedure, § 243. In 1885, district attorneys were authorized to appoint stenographers "to take the testimony given before the grand juries" (Code of Criminal Procedure, § 952-p), and a later statute (§ 952-t), provided that "it shall be his [the

it was not the practice in most federal districts to make a "verbatim transcript of the evidence given before the grand jury * * *." (*ibid*, pp. 179–180). For these reasons, Rule 6(d), authorizing the presence of a reporter or stenographer before the grand jury, is permissive rather than mandatory. *United States* v. *Labate*, 270 F. 2d 122, 123–124 (C.A. 3), certiorari denied *sub nom. Sussman* v. *United States*, 361 U.S. 900; *United States* v. *Martel et al.*, 17 F.R.D. 326, 328–329 (N.D. N.Y.); *United States* v. *Borys*, 169 F. Supp. 366, 368 (D. Alaska); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 452; see *United States* v. *Oley*, 21 F. Supp. 281, 282 (E.D. N.Y.); *United States* v. *Weathers*, 21 F. Supp. 763, 765–766 (N.D. Ga.). "There is no constitutional or statutory right in the defendant that grand jury minutes be taken or transcribed by a stenographer * * *." Orfield, *The Federal Grand Jury, supra.*

2. Petitioners contend (Br. 48), however, that "the extraordinary circumstances of this case present a situation where the prosecutor's asserted failure to record the testimony of a particular witness was an abuse of his power."[31] They argue (Br. 46, 52) that

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stenographer's] duty to take in shorthand or upon a typewriting machine the testimony introduced before such grand juries. * * *." These statutes appear to be read as mandatory by New York state courts. *People* v. *Steinhardt*, 93 N.Y.S. 1026, 1027–1028, 47 Misc. 252; *People ex rel. Hirschberg* v. *Supreme Court*, 269 N.Y. 392, 199 N.E. 634; cf. *People* v. *Benin*, 61 N.Y.S. 2d 692, 693, 186 Misc. 548.

[31] Petitioners charge (Br. 45–46, 55–56) that the government further abused its prosecutorial function because venue was laid in the Houston Division of the Southern District of Texas rather than in the Corpus Christi Division, in which the individual petitioners reside and in which the School District is

the prosecutor knew that Heras would be a vague, inconsistent and untrustworthy witness, and that he, therefore, refrained from transcribing Heras' testimony in order to minimize impeaching material that might otherwise be available to the defense at trial; and that "[w]hat the prosecutor did in this case was to transcribe where he wished to do so and make no

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located. Although petitioners moved in the trial court for a change of venue (I, 30, 101–105) and to transfer the case to another division (I, 154–167), those motions were denied (I, 310). While that ruling was challenged in the court of appeals, no issue with respect to venue was presented in the petition for certiorari. Accordingly, the question is not properly before this Court. Rule 23(1)(c) of the Revised Rules of this Court. Petitioners' suggestion (Br. 5–6) that the venue claim is proper because of the government's recent discovery that Heras' grand jury testimony was not transcribed has no substance; the two questions are obviously unrelated. Finally, the complaint that petitioners should have been tried in the Corpus Christi Division should be contrasted with petitioner Parr's previous contention, made in his federal income tax evasion case less than a year before the indictment in the instant case, that he could not obtain a fair trial in that district. The trial court there accepted his contention. See *Parr* v. *United States*, 351 U.S. 513, 514; *United States* v. *Parr*, 17 F.R.D. 512, 517–520.

Petitioners also emphasize (Br. 9) that state court convictions of petitioners Parr, Chapa and Donald "on charges growing out of the same matters involved in the present case" were reversed on appeal in 1957. The instant indictment was returned in March, 1956. The first trial under the indictment was held in November and December 1956; some of the petitioners were acquitted of some of the counts, and a mistrial ensued as to the other counts (II, 455–457). Petitioners were convicted in the instant case on July 17, 1957. The state court convictions of petitioners Parr and Donald were not reversed until November 20, 1957 and June 19, 1957, respectively (*Parr* v. *State*, 307 S.W. 2d 94 (Tex. Crim. App.); *Donald* v. *State*, 306 S.W. 2d 360 (Tex. Crim. App.); petitioner Chapa's state court conviction was reversed on March 13, 1957; *Chapa* v. *State*, 301 S.W. 2d 127 (Tex. Crim. App.)).

transcription where he thought it would hurt his case."

The government unequivocally denies that there was any impropriety in the failure to transcribe the testimony of Diego Heras, or that its failure to do so was because the prosecutor "thought it would hurt his case."

Petitioners' argument rests on the assumption that Heras was singled out as a dubious witness whose testimony, if transcribed, might subsequently prove embarrassing to the government. The same argument, however, would apply equally to the testimony of the three other witnesses before the grand jury whose testimony was also not transcribed (see *supra*, p. 55). But petitioners do not, and obviously could not, contend that the government did not transcribe the testimony of a witness such as W. D. Main, a federal postal inspector, because it was apprehensive that such testimony might be inconsistent with his anticipated trial testimony.

The fact of the matter is that when Heras and Main appeared before the grand jury on March 6, 1956, most of the witnesses had already been heard. Indeed, the case was then so well developed that the grand jury returned the indictment later the same day. Heras had already made a great many statements to government agents and had testified before an earlier grand jury that had returned a tax indictment against petitioner Parr (see *supra*, p. 55). Accordingly, when Heras was called as a witness before the grand jury, the United States Attorney already knew what his testimony would be.

In these circumstances, the prosecutor, in the exercise of his discretion, was fully justified in concluding that there was no need to have the testimony of this witness transcribed. The prosecutor's decision is particularly understandable in view of the fact that Heras's testimony related only to the background of the scheme, since the events of which he had direct knowledge occurred prior to the limitations period (see *supra*, note 8, p. 12; *infra*, p. 70). Furthermore, when Heras appeared before the grand jury, the prosecutor had no reason to suppose that such testimony might be available to the defense at trial. For Heras testified on March 6, 1956, prior to this Court's decision in *Jencks* v. *United States*, 353 U.S. 657. It was only after the *Jencks* decision that there were widespread demands by federal criminal defendants for production of grand jury transcripts.

The suggestion that the government did not record Heras' grand jury testimony because it desired to keep something from the defense is inconsistent with other facts of record. *Jencks* v. *United States*, *supra*, 353 U.S. 657, was decided while this case was at trial (VII, 2285). Thereafter, during the trial, the prosecutor turned over to defense counsel 122 prior statements made by government witnesses, even though some of them were clearly not within the rule of *Jencks* (Ia, 31). Government Tender 14, for example, begins with the heading "Diego Heras says—", but the document was not signed by anyone—neither Heras, nor the official who heard the statement, if any, nor even the person who typed the document.

Moreover, the person to whom this statement was purportedly made is not identified in the document.

Finally, there is no basis for the charge that the government knew, or anticipated, that Heras would be an unreliable witness. On the contrary, as we show *infra* (pp. 71–78), Heras' direct testimony was fully corroborated by the other evidence in the case; his testimony was not shaken during an extensive cross-examination; and petitioners can point to only a single inconsistency in his prior statements, which involved solely a collateral matter not involved in his direct testimony.

Thus, there was no singling out of Diego Heras as the single witness whose testimony was not transcribed; and there is no basis for the charge that the prosecutor failed to transcribe his testimony in order to avoid material that might subsequently be helpful to the defense.

B. EVEN ASSUMING *ARGUENDO* THAT THE GOVERNMENT'S FAILURE TO TRANSCRIBE HERAS' GRAND JURY TESTIMONY WAS ERRONEOUS, PETITIONERS WERE NOT PREJUDICED THEREBY, SINCE EVEN IF THE TRANSCRIPT HAD EXISTED THEY WOULD NOT HAVE BEEN ENTITLED TO IT. THEY ERRONEOUSLY SOUGHT IT AS OF RIGHT AT THE TRIAL, AND WITHOUT ATTEMPTING TO SHOW ANY PARTICULARIZED NEED THEREFOR; AND THE RECORD DOES NOT SUPPORT THEIR PRESENT CLAIM THAT THEY HAD A PARTICULARIZED NEED FOR THE TRANSCRIPT.

1. The facts with respect to petitioners' demand for Heras' grand jury testimony demonstrate that they made no attempt to show any particularized need therefor, but sought it as of right. At the beginning of Heras' direct testimony, defense counsel

asked for access to any statements made by the witness touching the subject matter of his testimony so as to follow the testimony, although counsel admittedly had "had him on the witness stand four times. I know what his testimony will be * * *." (VII, 2284–2285). A ruling on this request was deferred until the end of the direct examination (VII, 2296, 2318). During a lengthy discussion to determine what statements were in existence (VII, 2284–2320), defense counsel did not request the grand jury minutes of Heras' testimony, expressly stating "I am not asking about Federal grand jury testimony" (VII, 2313). After Heras had completed his direct testimony, the government delivered ten statements to defense counsel (VIII, 2429–2437).[32]

[32] Labeled Government Tenders 1–10, they were:

1. An affidavit executed on March 18, 1953, by Heras to a Texas official.

2. An affidavit executed April 30, 1953, to a Texas official.

3. A sworn statement given to Special Agent Edgar W. Henley, on December 11, 1953.

4. A signed statement given on February 9, 1954, to Post Office Inspectors Main and Cauley, which included a signed statement given one day earlier to the two inspectors.

5. A memorandum of interviews conducted February 8 and 9, 1954, prepared by the inspectors.

6. An unsigned memorandum of an interview conducted by the inspectors on February 15, 1954.

7. An affidavit executed by Heras on April 9, 1954, and a handwritten affidavit signed by Heras on April 21, 1954, before a Special Agent named W. H. Niendorf.

8. An unsigned, undated statement purportedly made by Heras to an internal revenue agent in May 1954.

9. A transcript of Heras' testimony before an improperly constituted Texas state grand jury entitled, "Diego Heras, Questions by Gresham."

10. A transcript similar to 9, above, entitled "Questioning, Sam H. Burris."

Defense counsel then made a "request * * * for the testimony of this witness before the Federal grand jury." A brief colloquy ensued during which defense counsel made no attempt to show any need for the transcript, did not request the court to examine it, and failed to advance any authority for his request, although invited by the court to do so. Defense counsel stated only that "[w]e would like to establish the fact that he [the prosecutor] does have this testimony and has it in the courtroom and had it prior to the time the trial started" (VIII, 2441). The court denied the request, saying, "It is my opinion that it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it" (VIII, 2442).

Heras was subjected to a searching and protracted cross-examination, which occupies more than 700 pages of the printed record (VIII–IX, 2482–3197). During its course, defense counsel was given, in addition to the material given to him at the close of the direct examination (see note 32, *supra*, p. 64), six other statements made by the witness out of court.[33] Although petitioners now state (Br. 14) that "[o]n cross-

[33] Two were handwritten statements made on April 9 and 11, 1953 (VII, 2470–2471, 2480, 2520–2521; Govt. Tenders 11, 12). The other four statements were made on February 10–11, 1954, and August 11, 1955 (VIII, 2480–2481; Govt. Tenders 13–16).

The court originally ruled that Govt. Tender 11, a statement made by Heras at Galveston, Texas, on April 9, 1953, did not relate to the subject matter of his testimony at this trial (VIII, 2479). However, this statement was later admitted in evidence as Defendants' Exhibit 213 (IX, 3173). Government Tender 12 was admitted as Defendants' Exhibit 214 (IX, 3177).

After the government had closed its case, another pretrial statement made by Heras was found among miscellaneous papers (XII, 4082–4083; Govt. Tender 69). The court offered

examination it was also demonstrated that there were numerous inconsistencies between Heras' testimony at the trial and * * * his previous statements and testimony" (which we deny, see *infra*, pp. 72–78), they did not thereafter either renew their demand for production of the grand jury testimony on the basis of such alleged inconsistencies, or even request the trial court to examine the grand jury transcript to ascertain whether it was inconsistent with the witness' trial testimony.

The foregoing facts establish, we submit, that this case is controlled by *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395. There, in holding that the trial court had not erred in refusing to make the grand jury transcript of a government witness available to the defense for use in cross-examination, the Court stated (p. 400) that the "burden * * * is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of [grand jury] secrecy"; and it ruled (pp. 400–401) that:

> the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a "right" to the transcript because it dealt with subject matter generally covered at the trial. * * * The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have.

Similarly, in the instant case, petitioners "failed to show any need whatever for the [grand jury] testimony of the witness" Heras, but sought it solely as of right. Although petitioners now advance various arguments as to why they needed the transcript (Br. 34–38), they did not seek it on these bases at the trial. They did not request the trial judge to examine the transcript to determine if it was inconsistent with the subject matter of Heras' testimony, did not suggest any special reasons for disclosure, and did not themselves see any need for the grand jury transcript when they first raised the question of out-of-court statements. Even after completing their lengthy cross-examination of Heras, petitioners did not make any attempt to show a need for the transcript, renew their request for its production, or otherwise attempt to invoke the trial court's discretion.

Although petitioners now contend (Br. 39) that defense counsel "was just beginning to establish a basis for his motion" when the trial judge stated his view that the transcript was absolutely privileged, the record neither indicates, nor even suggests, that the trial judge would have precluded petitioners from showing a need for the transcript. On the contrary, the record reveals that petitioners relied solely on their blanket demand for production, the same basis on which they sought the out-of-court statements made

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to recall the witness for further cross-examination (XII, 4097), but defense counsel did not do so.

We have lodged with the Clerk of this Court all of the out-of-court statements made by Mr. Heras which we have been able to locate. These tenders were used by defense counsel at trial but, except for Tenders 11 and 12 (Def. Ex. 213, 214), were not included as exhibits. These statements have been referred to by petitioners in their brief (p. 14) as allegedly showing inconsistencies with the trial testimony.

by Heras which were furnished to them."[34] The trial judge's statement, made in denying production, that the transcript was privileged, must be read in the light of the claim to which it was addressed. Thus viewed, it does not support petitioners' present claim (Br. 38) that the "judge held that he had no discretion to grant access regardless of whether or not any need was demonstrated." The court ruled only that petitioners' claim as of right was not sufficient to justifying breaching grand jury secrecy—a ruling that was clearly correct. *Pittsburgh Plate Glass, supra.*[35]

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[34] "Mr. FOREMAN [defense counsel]. May it please the Court, the first further request we have is for the testimony of this witness before the Federal grand jury.

Mr. WILKEY [United States Attorney]. Your Honor, it is the Government's position that that is not covered by the Jencks opinion.

The COURT. That is the opinion of the Court. I don't know what the Supreme Court may say about it. Has the Supreme Court said anything about it?

Mr. FOREMAN. Not that I know of. I was——

The COURT. This Court will deny that request.

Mr. FOREMAN. We would like to establish the fact that he does have this testimony and has it in the courtroom and had it prior to the time the trial started.

Mr. WILKEY. I do not have it in the courtroom, and it is in my office, and until it is——

The COURT. It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it.

Mr. FOREMAN. We would like to know from the prosecuting attorney if there were any other statements or reports relating to the testimony of this witness, Diego Heras, not in his possession and which he has not produced but which he has knowledge of and which are subject to being produced by him should I so desire" (VIII, 2441-2442).

[35] Petitioners' reliance (Br. 36-37) upon *United States* v. *Zborowski*, 271 F. 2d 661 (C.A. 2), and *United States* v. *McKeever*, 271 F. 2d 669 (C.A. 2), is misplaced. In both of those

2. Petitioners now claim that they had a "need" for the transcript because (a) Heras was "the key prosecution witness" (Br. 13), and (b) there were "numerous discrepancies and contradictions" between Heras' trial testimony and "his previous statements and testimony concerning the subject matter of the case" (Br. 36; see Br. 14, 35). The record refutes both of these contentions—neither of which, significantly, was offered as a reason for production in the trial court.

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cases the court of appeals reversed criminal convictions because of the trial court's failure to furnish the defense with portions of the grand jury transcript of certain government witnesses. In both cases, the trial judge, in accordance with the practice of the Second Circuit, was requested to and did examine the grand jury transcripts, but concluded that they contained nothing significantly inconsistent with the witness' trial testimony. In each case the court of appeals, on the basis of its examination of the transcripts, reached the contrary conclusion, and therefore held that the trial court's failure to make the inconsistent portions available to the defense was reversible error.

Those cases, therefore, hold only that, in the factual circumstances there present, the discrepancies between the grand jury and trial testimony were sufficiently "material" (*McKeever*, 271 F. 2d at 672) or "substantial" (*Zborowski*, 271 F. 2d at 665) to require that the inconsistent portions of the grand jury minutes be given to the defense. The court's statement of the practice in the Second Circuit recognizes that the trial judge's obligation to screen the transcript *in camera* only arises if there is "some basis for supposing that his grand jury testimony may be at variance with his trial testimony" (*McKeever*, 271 F. 2d at 672), and only if he is requested to do so by defense counsel (*Zborowski*, 271 F. 2d at 665; *McKeever*, *ibid.*). Neither of these decisions holds that the defense is entitled to the entire transcript of a witness' grand jury testimony merely upon demand, or that the trial judge is required on his own motion to screen the transcript whenever a defendant seeks production. Indeed, in the *Zborowski* case (271 F. 2d at 666, fn. 2), the court of appeals distinguished the case at bar on the ground that "[i]n *Parr* the defendant made no request that the court examine the minutes *in camera*."

(*a*) There was no single "key" government witness; the government's case was established by 73 witnesses and over 200 exhibits, many of which contained numerous specific items. In a trial lasting two and one-half months, the government devoted only one day to the direct examination of Diego Heras; it was the defense which devoted all of five days and part of two more to his cross-examination. Heras' direct testimony dealt chiefly with events prior to July, 1951, when he ceased performing secretarial functions for the School District, and it was admitted for the specific limited purpose of showing the origin of the scheme to defraud, and not as proof of the substantive offenses. Moreover, there was an abundance of evidence showing that all the petitioners had participated in a massive fraud—evidence of such quality and quantity as to refute petitioners' contention that Heras' testimony was the pivot on which the government's case turned.

It is true that petitioners pitched their defense on the theory that Heras conceived and carried out, either singlehandedly or with unknown confederates, this fraud. Much of their lengthy cross-examination of Heras was designed to lay the foundation for defense witnesses who attempted to show that Heras was responsible for this vast mail fraud scheme for the five years it operated, including the two and a half years in which he did not sign a check and the year when he was not in the B.I.S.D. office.[36] The jury, however, did not accept these claims by the defense.

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[36] E.g., XII, 4130–4133, 4184–4187, 4198–4203, 4221–4222, 4322–4323, 4333, 4358–4359; XIII, 4494.

In the Statement, *supra*, we have relied on Heras' testimony only insofar as it showed the background and origin of the scheme—the sole purpose for which it was admitted. The record shows that Heras' testimony was amply corroborated, and that the essential elements of the scheme to defraud, and the use of the mails, were fully established by other evidence.[37]

The four bank tellers clearly remembered the cashing of groups of B.I.S.D. checks by Heras and petitioner Donald; it was the objection of the head teller, Carl Williams, which led Donald to establish the rule that B.I.S.D. checks were to be cashed even though they were not endorsed, and that no teller's stamp was to be placed on them (IV, 1011–1014). Williams was also cognizant of the fact that the fictitious checks were countersigned by petitioner Parr (IV, 1015–1016). Every postmaster in the area, and a post office inspector who made a specific search, attested to the fact that many of the payees named on the checks were fictitious. As to the background of the scheme, Benson supported Heras' statement that petitioner Parr was the usual recipient of the money, and Benson gained his knowledge from admissions made by petitioner Parr as well as from the fact that he occasionally participated in the delivery of money to Parr.

The fraudulent checks were forceful evidence. Long after Heras had left his employment with the District there were monthly checks signed by petitioners Oscar Carrillo, Sr., or Saenz and counter-

[37] For the convenience of the Court, we have summarized Heras' direct testimony in Appendix B, *infra*, pp. 91–100.

signed by petitioner Parr, payable to petitioners and their closest relatives. There were checks drawn to eight different fictitious persons, all endorsed and deposited by petitioner Saenz. There were checks drawn to schoolboys. There were checks drawn to illiterate ranch hands who purportedly painted and repainted the District's classrooms. There were taxpayers' checks which never got to the depository. There were taxpayers who received bills and paid taxes but never got on the taxrolls.

(*b*) The court of appeals stated (XVII, 5830) that "[n]umerous inconsistencies and contradictions" between Heras' trial testimony and his "prior statements and testimony" were inquired into by petitioners' counsel during cross-examination, and that Heras admitted "[s]ome inconsistencies and discrepancies * * * including an admission that he had sworn falsely in previous affidavits." The record shows, however, only one instance in which Heras made inconsistent statements, and these were not inconsistent with his trial testimony, but only with each other. The "tenders" made by the government of Heras' prior statements, which were not before the court of appeals but have been lodged with the Clerk of this Court (see note 33, *supra*, pp. 65–66), show that the other alleged "inconsistencies and contradictions" involved merely suggestions of inconsistency made by defense counsel during cross-examination, and that in fact there are no such inconsistencies.

A typical example was the defense attempt to discredit Heras' direct testimony that, on several occa-

sions, Heras had delivered the proceeds of fictitious checks to petitioner Chapa (VII, 2351, 2394–2395). Defense counsel attempted to show from various prior statements of the witness, made between 1953 and 1956, that Heras had never revealed the information until May 31, 1956. Counsel made special reference to two pre-trial statements (Govt. Tenders 1, 4, 7) executed prior to May 31, 1956, in which, according to defense counsel, no reference was made to a delivery of the proceeds of the fictitious checks to petitioner Chapa (IX, 2857–2862). Government Tender 4, p. 5, shows, however, that on February 8, 1954, Heras specifically stated that "in some instances by Mr. Parr's direction I gave the money to D. C. Chapa". On April 9, 1954, Heras similarly stated that "in most instances" he delivered the proceeds of the fictitious checks to petitioner Parr (Govt. Tender 7, p. 1). Likewise, on December 11, 1953, Heras stated that "in some instances, two or three instances, I delivered the money to D. C. Chapa from instructions of Mr. Parr". (Govt. Tender 3). Later, when challenged by the prosecution on redirect examination, defense counsel admitted that he was wrong in attempting to suggest that Heras had never mentioned delivering the proceeds of the fictitious checks to Chapa until May 31, 1956 (X, 3207), but this concession was separated from counsel's attempt by 350 pages of testimony.

On several occasions defense counsel, by the form of his questions, suggested that Heras had advanced himself as much as $64,000 over a three and one-half year period commencing in 1948 and ending in

June 1951 (VIII, 2604, 2645). Apparently, counsel sought to establish that, since Heras' legitimate salary and travel allowances amounted to about $13,050 over this period,[38] Heras had improperly obtained as much as $50,000 from School District funds from 1948 through June, 1951. The defense exhibits, however, show deposits of some $32,000 rather than $64,000 during the three and one-half year period (Def. Ex. 208 A–FF, 215 A–C, E–O, 219–1 through 55).[39] The exhibits, when viewed in connection with the trial testimony, explain the source of the $17,000 excess deposits over and above Heras' salary and expenses. Some $10,500 represented money deposited in Heras' account at petitioner Parr's San Diego State Bank through the use of transfer checks drawn on B.I.S.D. funds in the Texas State Bank. This money was used to pay bank loans made by, and authorized advances to, other District employees (VIII, 2534–2535, 2539). The remaining $8500 represented currency deposits in Heras' account in the San Diego

[38] Defendants' exhibits 208 and 219 show that for the years 1948 and 1949 Heras received a total of $300 per month for salary and travel expenses. Beginning in 1950, the monthly payments were increased to $325.

[39] Defendants' Exhibit 208 is a photostatic duplication of Defendants' Exhibit 219–56 through 191.

Although Heras' special account in the petitioner San Diego Bank shows, according to typed deposit slips and a ledger sheet, a net deposit of $2,503.96 on February 15, 1952, and of $1,287.11 on March 18, 1952 (VIII, 2792, 2798), this must be viewed with skepticism. For all of Heras' earlier deposit slips were in his own handwriting (VIII, 2792); petitioners controlled the bank ledger sheet; *Heras borrowed $95 from the San Diego Bank on March 8, 1952;* and at trial he denied any knowledge of the deposits (X, 3229–3230).

State Bank, $3500 of which represented the advances given to Heras with petitioner Parr's approval (see *supra*, p. 6). The rest of this money was also used to pay notes, loans, and authorized advances to District employees other than Heras (VIII, 2551–2553). And although the testimony regarding these disbursements was not supported by the checks actually drawn to the order of other District employees, it should be noted that petitioners, who controlled the petitioner San Diego State Bank, were themselves responsible for concealing or destroying the microfilm records kept by the bank (see the Statement, *supra*, pp. 23–24).

As set forth in the Statement, *supra*, p. 13, Heras testified on direct examination that the practice of drawing District checks to the order of fictitious payees began when he was given a list of fictitious names and directed to issue B.I.S.D. checks in accordance with the list. He was uncertain whether he was given the first list by petitioner Parr, or by Mr. Benson after consulting with Parr. On cross-examination, defense counsel asked Heras whether or not Benson knew that the list was spurious. Heras replied that he did not know. Defense counsel then purported to quote the sentence "Benson knew they were spurious checks," from one of Heras' prior statements, executed on March 18, 1953 (VIII, 2491–2492). The statement referred to by defense counsel (Govt. Tender 1) does not contain the sentence which he sought to attribute to the witness, and we have been unable to find this sentence in any of the other out-of-court statements made by the witness. Mr. Heras

actually said (Govt. Tender 1, p. 2) that he had not issued any checks unless directed to do so by either petitioner Parr or Benson, but this is not an allegation that Benson knew of the fictitious nature of the listed names."[40]

The one inconsistency in all of Heras' out-of-court statements is between defendants' Exhibits 213 and 214. Exhibit 213 is a sworn statement given by Heras to the F.B.I. on April 9, 1953. He there said that on several occasions petitioner Parr had sent him from San Diego to Corpus Christi, Texas, to deliver envelopes containing money to L. C. Smith of the Palm Finance Company, and that on one occasion in 1950, the trip to Corpus Christi followed two phone calls, one received by Heras in Benavides from a telephone operator informing him that George Denton of the F.B.I. office in Corpus Christi wished to speak to Parr and the second a call placed by Parr from Benavides to Denton in Corpus Christi, in response to the message. Heras stated that he believed, but was not certain, that the envelope which he carried to Corpus Christi following the two phone calls contained

[40] Other inconsistencies between Heras' testimony and his prior statements suggested by defense counsel at trial related to imputations of a history of mental illness, supposedly manifested by cavorting with second graders and writing on walls (VIII, 2778, 2785); inconsistency in the use of the word "kickbacks", where it was patent that Heras was talking of one situation in the prior statement but understood the question at trial to refer to another, different, situation (VIII, 2658–2659, compare Govt. Tender 9, p. 105); and allegations that Heras had denied, in a prior statement, that he had endorsed a particular check, whereas in fact the witness had merely expressed doubt as to his responsibility for one endorsement on one check (IX, 2888–2890). They similarly have no basis in the record.

money; and that, even if it did, he did not know for whom the money was intended after its delivery to Smith at the Palm Finance Company. Heras further stated that he had not discussed the delivery of these envelopes to Smith with anyone except Mr. J. L. MacDonald of Benavides; and that, in discussing the deliveries with MacDonald, Heras never told MacDonald that he took $5,000 from George Parr to George Denton of the F.B.I. but only told MacDonald about the coincidence of the Denton telephone calls and the subsequent delivery to Smith.

Defendants' Exhibit 214 (Government Tender 12) is a signed sworn statement given by Heras two days later. He there said that on two different occasions he had told MacDonald that Parr put $5,000 in an envelope for delivery by Heras to Denton. Heras further stated that what he had told MacDonald both times was false; that his statement in Defendants' Exhibit 213 that he had not told such a story to MacDonald was false; and that his earlier statement that he had not discussed deliveries of envelopes containing money with anyone except MacDonald was false.

When asked about these inconsistencies on cross-examination, Heras testified that the statements in the first statement (Exhibit 213) were correct and that the second statement, made two days later, was incorrect (IX, 3180, 3184).

Thus, although petitioners were given many out-of-court statements of Heras, they can show only a single instance of actual inconsistency. That inconsistency was not with Heras' trial testimony, but between two of his statements. It related solely to a

collateral matter touching on the witness' credibility. These minor inconsistencies were fully developed at the trial, and their significance was argued to the jury (XV, 5234–5236). They plainly afford no basis for petitioners' present sweeping claim (Br. 39) that Heras' trial testimony was shown to be untrustworthy and perjured.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

EDGAR O. BOTTLER,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

MARCH 1960.

APPENDIX A

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared GRANT E. PERRY, who being by me first duly sworn, on his oath deposes and says:

During the months of January, February and March, 1956, I reported the testimony of certain witnesses before the Federal Grand Jury in Houston, Texas in the matter of United States of America v. George Parr, et al. Because it was desired that the pages of testimony taken run consecutively, I maintained a record of the witnesses whose testimony was taken and the page numbers of the transcript (a copy of which record is attached hereto as Exhibit "A") as well as my shorthand notes. I was unable to report the session of such Grand Jury on the afternoon of February 7, 1956 when Mr. John Leydens, another court reporter, reported and transcribed the testimony of five witnesses who appeared in the above matter on that afternoon. I did not maintain an independent record of the witnesses whose testimony was reported by Mr. Leydens. However, Mr. Leydens and I coordinated our page numbers so that the page numbers of all witnesses whose testimony was reported run consecutively from pages 1 through 2401, and the transcripts show the

EXHIBIT "A"

names of the witnesses whose testimony was reported by Mr. Leydens.

I have examined the original transcripts of the testimony of witnesses appearing before the Houston Grand Jury in the matter of United States of America v. George Parr et al., my personal record of the names of the witnesses whose testimony I reported, and my notes. From these records, I am able to state that neither Mr. Leydens nor I reported the testimony of W. D. Main, Dorothy D. Forbes, Jose Tovar or Diego Heras.

Grant E. Perry

SUBSCRIBED and SWORN TO before me this the 2nd day of March, 1960.

Notary Public

Franklin Reed pp 1 - 56 56 pp

Richard Barton pp 57 - [redacted] 147 91 pp

H. L. Neras 148 - 210 63 pp

Joe Vallo 211 - 264 54 pp

Green Moffett 265 - 302 38 pp

Ray Allen 303 - 314 12 pp

Mildred Daniel 315 - 392 78 pp

J M Perkins 393 - 421 [redacted] 29 pp

Mrs Richard Ney 422 - 431 10 pp

Louis Agnor 432 - 445 14

Emmie Keough 446 - 463 18

Edna Williams 464 - 476 13

Rita D. Olaza 477 - 494 18

Maria E. Garcia 495 - 512 18

+ 46

558

$46.40

$521.40

Camilo G. Ramirez	513	–	538	26
R. W. Milligan	539	–	650	112
Dr. E. E. Dunlap	651	–	752	102
Santiago Garcia	753 (first part, del. 20 pages)	–	772	
	second part		774	22
Serafin [illegible]	775	–	781	7
J. L. McDonald	782	–	911	130
Eusebio Carrillo	912	–	952	41
Jesus Garza	953	–	1018	66
Maria Luz Garcia	1019	–	1064	46
Raymond R. Sparkman (Rollins)	1065	–	1076	12
Lorenzo Garcia	1077	–	1087	11
F. W. Canales	1088	–	1123	36
Octavio Saenz (Trade)	1124	–	1144	21
[redacted] (Rate)				
C. P. Stansell (Trade)	1145	–	1209	65
Jose Neras	1210	–	1229	
			-512	
			717	

Week of Feb 6 - 9th

Nilza Palacios	1230	- 1254	25
Rep Chandler	1255	- 1272	18
Buffalo Rapa	1273	- 1344	72
Jesus Oliveira	1345	- 1362	18
My. Lib. Canales	1363	- 1416	54
Liberio Canales	1417	- 1439	23
Dr. J.C. Gonzalez	1440	- 1465	26
Maria Vila Rodrigues	1466	- 1543	78
W.C. Kelly	1544	- 1561	18
John's numbers	1562	- 1606	45
V.L. Jewell	1607	- 1701	95
Delfina Briones	1702	- 1776	75
Vidal Oliveira Borges	1777	- 1808	32
C.L. Oliveira	1809	- 1898	90
Amado Garcia	1899	- 1942	44
Alvaro Nevarez	1943	- 1952	10
	1953	- 1977	25

—OVER—

2132
1229
903
-95
808

808
.80
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1000
$ 746.40

1701

1701 to 2100

1701 1700 2100

Victor Leal 1978 - 2000 23
Enrique Garcia 2001 - 2015 15
Amador Caballero J. 2016 - 2061 46
Antonio W. Tobin 2062 - 2093 32
Wilberto Segura 2094 - 2107 14
Ernesto Garcia 2108 - 2119 12
Ramiro Salinas 2120 - 2132 13

124

Hilda Chapa Gonzalez 2133 - 2265 133

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March 5, 1956

	Pages
Rosa Perez 2266 – 2277	12
Gabriel Garcia 2278 – 2296	19 "
Herschel E. Harrington 2297 – 2309	13 "
Amador Caballero, Jr. 2310 – 2331	22 "
Dan Smith 2332 – 2338	7 "
L. T. Cramer 2339 – 2353	15 "
✓ Reynaldo Chapa 2354 – 2382	29 "
Francisco Sanchez 2383 – 2394	12 "
Francisco Currillo 2395 – 2401	7 "

AFFIDAVIT

State of Iowa, Jasper County, SS:

I, the undersigned, being first duly sworn, on oath state:

1. That a further meticulous check of my records reflects that I did report the afternoon session of the grand jury proceedings on February 7, 1956.

2. That I transcribed 95 pages of testimony reported before this session, but am unable to say whether this was a transcript of all testimony or only part of the testimony taken at that time.

3. That my records do not reflect the names of witnesses appearing before the grand jury on February 7, 1956, afternoon sessi , but that I presume the minute book records enclosed with your initial inquiry are accurate in this respect.

4. That the minute book records of February 7, 1956, indicate that Diego Heras did not appear as a witness and that this is in accordance with my recollection of the matter.

John Leydens
John Leydens

Subscribed in my presence and sworn to before me by John Leydens this 17th day of February 1960.

Margaret Baker
Margaret Baker
Notary Public within and for Jasper County, State of Iowa

Grand Jury Assignments for (Special) January 23, 1956

Docket No.	PARTIES	WITNESSES FOR U. S. Cases	REMARKS—DATE
		Grant Perry, Reporter (Special)	
#14	UNITED STATES	W. S. Main, Reporter	appears; no
	vs.	W. Franklin Reid	action taken
	Joe W. Parr,	Richard Barton	1-23-56
	A. C. Chapman, dba	Herbert J. Heran	Helen Beaumont Secy
	Normal County	Mrs. J. Heran	
	(Mark Frank)	Joe Wells	
		Mary Green Moffatt	
		Grant Perry, Court Reporter	appears; no action taken 1-23-56
	UNITED STATES	Roy Allen - Navy Dept.	Helen Beaumont, Secy.
	vs.	Mrs. Mildred Mabrel	
		J. M. Perkins	
		Mrs. Richard Ney	
		Mrs. Lyra Agner	appeared; no action taken
		Mrs. Eugene F. Keough	
		Mrs. Edna D. Williams	
	UNITED STATES	Mrs. Rita Garza Olan	Helen Beaumont Secy
	vs.	Mrs. Maria Elvia Garcia	1-23-56
		Grant Perry, Court Reporter	
		Dorothy L. Perkins	Appeared & testified as to Exhibit 1 & 2
		Mr. Clerk, Reporter	Exhibit 1 & 2 1-23-56
		Carmelo G. Ramirez,	
		Grant Perry, Reporter	appeared, no action
	UNITED STATES	Mrs. Joseph L. Fegan	taken 1-30-56
	vs.	L. F. Millegan	Helen Beaumont Secy
		G. C. Cowan	
		Santiago Garcia	appears no action
		Jesus M. Guerra	Taken 1-31-56
		James L. McDonald	Helen Beaumont
		Rosalio Carrillo	Secy
		Mrs. Joseph L. Fegan	
		Grant Perry, Court Reporter	(continued)

Grand Jury Assignments for (Special) January 23, 1956

Docket No.	PARTIES	WITNESSES FOR U. S.	REMARKS—DATE
	UNITED STATES	James P. Garza	
#14	Jose R. Perez, et al (Hemphill County)	Maria Luis Galeana	
		James L. McGregor	appeared; no
		Raymond H. Sparkman	Action taken.
		Lorenzo Marcia	2-1-56
		F. H. Canales	Helen Arnsment, Dep.
		Santiago Garcia	
		Grand Petty Court Reporter	
	UNITED STATES vs.	Octavio Saenz	appeared; no
		Jose Heras	Action taken.
		Mrs. Leighton Logan, Interpreter	2-2-56
		C. P. Stansell Grand Petty Court Reporter	Helen Arnsment Dep.
		Nicolas Pelacios	
		Ray Chandler	appeared; no
		Thula J. Gruy	Action taken.
	UNITED STATES vs.	Buford Hicks	2-6-56
		Ofelia Delgado	Helen Arnsment Dep.
		Mrs. Liberia Canales	
		Liberia Canales	
		Dr. J. C. Gonzales	
		Maria Elia Rodriguez	
		Grand Petty Court Reporter	appeared; no Action taken
	UNITED STATES vs.	R. R. Gonzales	Helen Arnsment,
		Luis Felipe Garcia	2-7-56 Dep.
		Romeo Salinas	
		Ramiro Miguel	
		John Leighton Court Reporter	
		Costumio Ruiz Lopez	

Grand Jury Assignments for (Special) January 23, 1956

Docket No.	PARTIES	WITNESSES FOR U. S.	REMARKS—DATE
#14	UNITED STATES	V. L. Sewell	February 9, 1956
	vs.	Delfin Briones	appeared,
	Eugene B. Parr,	Helen Simmons Bridges	no action taken.
	A. C. Chapa	C. L. Oliveira	Helen Ainsworth, Secy
	et al	Grant Perry, Court Reporter	
	(Duvall County)		
		Armando Garcia	
		Alvaro Guevara	
	UNITED STATES	Victor Leal	February 9, 1956
	vs.	Carlos Garcia	appeared, no
		Amador Caballero	action taken
		Antonio W. Tobin	Helen Ainsworth, Secy
		Hilbert Segura	
		Conseta Garcia	
		Ramiro Salinas	
		Grant Perry, Court Reporter	
	UNITED STATES	Hilda Gonzalez	Appeared, no action taken
	vs.	Grant Perry, Court Reporter	February 16, 1956
		Inez Tonge (no court reporter)	Helen Ainsworth, Secy
		Rosa Perez	
		Gabriel Garcia	(appeared, no
		Mrs. Josephine Logan, Stenographer	action taken
		Winnibel F. Harrington	H. Ainsworth
		Amador Caballero Jr.	2/16/56 Secy
	UNITED STATES	Grant Perry, Court Reporter	
	vs.	Dan Smith	
		E. T. Cravens	
		Rosalio Chapa	
		Francisco Sanchez	
		Alfonso Carillo	
		Diego Heras	Mar. 6, 1956
		W. B. Mainwaring	True Bill
		(no court reporter today)	H. Ainsworth
			Secy.

CERTIFIED COPY (Rev. April 1953) D. C. Form No. 30

United States of America

SOUTHERN DISTRICT OF TEXAS } ss:

I, V. Bailey Thomas, Clerk of the United States District Court for the Southern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original entries under date of January 23, 1956, in the Houston Grand Jury Assignment Book, pertaining to United States vs. Geo. B. Parr, et al (Duval County).

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Houston, Texas, this 1st day of December, A. D. 19 59.

V. BAILEY THOMAS
Clerk.

By Juanita Fobb
Deputy Clerk.

APPENDIX B

DIRECT TESTIMONY OF DIEGO HERAS

Heras was employed by the B.I.S.D. in one capacity or another from 1930 or 1931 until March 1953. Initially he served as deputy tax assessor-collector, but around the middle of 1938 he was also appointed "acting secretary" of the B.I.S.D., a position he retained until July of 1951. From July, 1951, through December, 1952, he was relieved of his duties as acting secretary but continued to perform services as deputy tax collector-assessor.[1] After December 1952 Heras was no longer employed as deputy tax collector-assessor,[2] but during the first three months of 1953 he compiled the lots and blocks within the city of Benavides for the B.I.S.D., working at his private office in the Heras Building in Benavides, Texas.[3] (VII, 2320–2321, 2392–2393).

[1] From 1949 through 1950 or 1951, petitioner Chapa was secretary of the school board and tax assessor-collector (VII, 2322). In 1950 or 1951, petitioner Oscar Carillo was named to the office of secretary. He assumed the duties of that office when Heras was relieved in July of 1951 (VII, 2322). Meanwhile, petitioner Chapa continued to occupy the position of tax assessor-collector.

[2] Heras did not know exactly what occasioned his leaving the School District office in December of 1952. As he recalled, "[H]e [petitioner Saenz] told me he had discussed my job or position with the School District with the rest of the boys, and Mr. Parr and they had seemed to be—not to like me" (VII, 2391).

[3] The office was opened for public stenographic work in late 1952. While the office door carried the name "Heras & Heras", Heras operated and maintained the office on his own account for the first three months of 1953 (VII, 2357–2358).

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For the purpose of clarity Heras' direct testimony will be divided into two periods: (1) that concerning events of the B.I.S.D. from 1949 through July, 1951, when Heras performed duties as "acting secretary"; (2) that concerning events of the B.I.S.D. from July, 1951 through December, 1952, when Heras performed services as deputy tax collector-assessor.

I

EVENTS PRIOR TO JULY 1951

Between 1949 and July 1951, Heras' principal duties consisted of preparation of tax rolls and management of the business office connected with the bookkeeping department of the School District. These duties included the preparation of the payrolls and the drawing of checks on School District funds[4] and, until July 1951, were performed in an office located in the Parr Building[5] in San Diego, Texas, a town not located in the B.I.S.D. (VII, 2321–2322, 2326, 2359).

Heras testified to four major occurrences during his tenure as acting secretary.

A. *Fictitious check scheme*

In late 1948 the practice of drawing checks to the order of fictitious persons began. On the first occasion petitioner Parr or Mr. W. M. Benson[6] handed

[4] Petitioner Chapa also signed checks as maker during this period (VII, 2326).

[5] A staff of five or six employees conducted business in the Parr Building for different organizations including the City of San Diego, the City of Benavides, the San Diego Independent School District, the Benavides School District and two other companies. The financial records of all organizations were maintained in a "general office" in the Parr Building (VII, 2324).

[6] Benson was the auditor for the B.I.S.D. during his years in the office of San Diego. Heras would do the detail work

Heras a list of monetary figures and fictitious names. Heras was directed to draw checks for the specified amounts and to the order of the designated names. As Heras recalled, the handwriting of the list was that of Parr's and the fictitious checks were countersigned by Benson.[7] After the checks were prepared, signed and countersigned, Heras delivered them to Parr on the latter's instructions (VII, 2329–2330).

The initial incident was repeated once or twice a month. On subsequent occurrences the list of fictitious names and amounts was supplied by Parr who instructed Heras that after the checks were prepared they were to be taken to petitioner B. F. Donald at the Texas State Bank at Alice, Texas. Pursuant to these instructions Heras would drive from San Diego to the bank in Alice where Donald would get the money represented by the checks from the different tellers' cages or drawers, put the money in a sealed envelope, and give the envelope to Heras. Heras would return to San Diego and deliver the envelope to Parr, usually at the latter's office. During this period, from 1949 to the middle of 1951, he would cash from three to fifteen checks each time. The total face value of the checks ranged from $3,000 or $4,000 to as much as $15,000. The cash which Heras received was usually in denominations of $50 or $100 (VII, 2331–2335, 2350). Heras testified that he never prepared a fictitious check on B.I.S.D. funds on his own initiative,

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and then present the books to Benson for balance and inspection. Benson also countersigned all district checks, prepared the budget of the school district and submitted reports to the state government. Additionally, Benson maintained the books for the Parr & Delaney Oil Company, the Parr Oil Corporation, and other clients (VII, 2325, 2327, 2359).

[7] Parr began to countersign all district checks in June 1950 (VII, 2327, 2362–2365).

nor did he ever divert any of the proceeds from the fictitious checks to his own use (VII, 2351).[8]

While the foregoing was the general procedure for preparing, cashing and delivering the proceeds of the fictitious checks, Heras remembered certain occurrences which deviated from the norm. On one trip to the Texas State Bank, Donald was not available and Heras contacted Carl Williams, a teller, who requested that Heras endorse the name of the fictitious payees, "by Diego Heras." Heras refused to do so. Donald returned to the bank at that moment, talked privately with Williams, and then instructed Williams in Heras' presence to cash the checks without an endorsement. Williams cashed the unendorsed checks but refused to place his teller's stamp thereon. Upon returning to San Diego, Heras, at Donald's request, told Parr that Parr was to telephone Donald. After the phone conversation Parr advised Heras that, in the future, the latter was to endorse the payee's name and not his own[9] (VII, 2341–2345).

A second incident which Heras particularly recalled involved a visit to the Texas State Bank when neither Donald nor Williams was available. Mrs. Edna Fitch, a teller, gave Heras $3,000 in cash for a total value of $4,000 in fictitious checks. Mrs. Fitch failed to seal the envelope in which the money was contained, and, about midway during his return automobile trip from Alice to San Diego, Heras noticed the contents of the envelope protruding on the front seat of his car. His attention became centered on the fact that he could see only three bundles of bills instead of four,

[8] On one occasion in 1948 Donald telephoned Parr in San Diego to verify the total amount of the checks (VII, 2348–2349).

[9] After the Williams incident some of the fictitious checks were endorsed with the payee's name and some were cashed without an endorsement (VII, 2345).

whereupon he stopped the car, counted the money, and discovered that he had been shortchanged. He continued his trip to San Diego and telephoned Mrs. Fitch upon his arrival. She checked her teller's drawer, discovered the error, and requested that he return to Alice to obtain the additional $1,000 to which he was entitled.[16] After the mistake was corrected, Heras delivered the full $4,000 to Parr (VII, 2345–2347).

In addition to the Williams and Fitch incidents, which deviated from the normal procedure of obtaining the proceeds of the fictitious checks from Donald, Heras recalled two occurrences where, instead of delivering the money to Parr at the latter's office, he made a different disposition of the money. On one occasion the envelope containing money was delivered to Parr in the bank (when the latter happened to be there). On a second occasion Heras delivered the money to Parr at the latter's home (VII, 2348).

On one occasion Heras delivered the money to Benson because Parr was not available to receive it personally (VII, 2350).

In 1950, pursuant to instructions from Parr, Heras once delivered the money to petitioner Chapa at the San Diego office. On this occasion, after the money was given to Chapa, both Heras and Chapa drove to the Cash Store in Benavides, where Chapa paid his account with some of the money that Parr had instructed Heras to deliver to Chapa that very day (VII, 2351, 2394–2395).

Government Exhibit 17 A–P was a group of sixteen checks. Heras testified that he had lived in Duval County, Texas, all of his life, that each of the payees on these checks was fictitious, that each check was

[16] The following day Heras expressed his gratitude by giving Mrs. Fitch a two-pound box of chocolate candy (VII, 2347).

drawn by him and countersigned by petitioner Parr, and that the work for which they were drawn was never done according to his knowledge [11] (VII, 2336–2341).

Heras also identified other checks which were government exhibits,[12] many of which Heras prepared under instructions from petitioners Chapa, Garcia, Saenz, Garza and Parr, each of which was countersigned by Parr or Benson, and all of which were either payable to the order of living persons for services not rendered, or to the order of fictitious persons, likewise for services not rendered. In some cases the surnames of living persons were used, and only the initials were fictitious. In most instances the checks were delivered to the petitioner who requested that the checks be drawn (VII, 2395–VIII, 2416).

B. *Mail of the B.I.S.D.*

Prior to July 1951, it was part of Heras' duties to pick up the mail of the B.I.S.D. at Benavides and take it to the office in San Diego. Upon return to San Diego, the mail would be opened by Miss McCoy, Benson or Heras (VII, 2365–2366).

C. *Bookkeeping and bank deposits of B.I.S.D.*

Between 1949 and July 1951, the bookkeeping system for the School District was on a cash basis. The tax collector's cash book recorded daily receipts in cash and by check. The checks were entered in

[11] In reference to Government Exhibit 9, a list of fictitious checks compiled from the annual reports, Heras recognized the names thereon as the same names contained on the lists that Parr would hand Heras from time to time to enable Heras to prepare the fictitious checks (VII, 2352–2354).

[12] These included Exhibits 1, 107, 108, 109-A, 110-J, 110-M through 110-TT, and 111 (VII, 2395—VIII, 2416).

numerical order according to receipt number. This book was balanced against the bank deposit slips, on which the name of the taxpayer and the amount of his payment was typewritten. In some instances, when the signature of the taxpayer was not legibly written or printed, the bank on which the check was drawn and the number of the check was listed on the deposit slip. In any event, every individual taxpayer's check was itemized on the deposit slip itself, and the deposits were made at the Texas State Bank at Alice by Heras, Benson or Miss McCoy (VII, 2366, 2375–2381).

D. *School Board meetings*

During the period 1949 through July 1951, Heras had occasion to act as secretary for certain school board meetings which were attended by petitioner Saenz, president; Mr. Richard Barton, trustee; Mr. Earl Delaney, Mr. P. J. Green, Mr. W. C. Kelly, Mr. C. G. Ramirez and petitioner Jesus G. Garza, board members. Petitioner Parr, although not a member of the board nor an officer thereof, attended and presided over important meetings of the school board when such matters as bond issues or monetary affairs of the B.I.S.D. were to be discussed. Heras took notes of the meetings but omitted the remarks of Parr on the instructions of petitioner Chapa.

Heras did not prepare the annual reports of the school board but would pick them up at the Texas State Bank and present them to the board at regular meetings. Although Heras did not know whether the annual reports were inspected by any of the board members, he testified that they were approved and signed by the president, petitioner Saenz. They were then mailed by Heras or someone else to the State Board of Education at Austin, Texas (VII, 2386–2390).

II

EVENTS SUBSEQUENT TO JULY 1951

In July 1951 the offices and books of the B.I.S.D. were moved from San Diego to Benavides. Prior to the change in location, Heras informed Parr that he was not in favor of moving, and it was agreed that Heras would remain in San Diego (VII, 2360–2361). The agreement never materialized, however, and Heras worked in the offices of the B.I.S.D. in Benavides through December 1952 (VII, 2321–2322).

In Benavides, Heras' principal duties consisted of preparing renditions of property for tax rolls (VII, 2369). During this period Heras was no longer the acting secretary for the B.I.S.D., and he did not take School District receipts to be deposited at the Texas State Bank at Alice. Neither did he pick up the mail, nor prepare and cash any more fictitious checks drawn on B.I.S.D. funds. (VII, 2368, 2378).

After July 1951, the mail was picked up by Mr. C. L. Oliveira, Mrs. Yelia Oliveira Bridges or Mrs. Hilda Chapa Gonzales, none of whom had worked in the B.I.S.D. offices in the Parr Building in San Diego. It was deposited on the desks of petitioners Chapa and Oscar Carrillo. There the mail remained until opened by Mrs. Gonzales or Chapa, the tax collector (VII, 2367–2370). Much of the mail consisted of tax statements, tax payments by check or money order and return receipts[13] sent to the taxpayer. Heras estimated that ninety percent of the taxpayers remitted their payments by mail. He identified Government Exhibits 148 and 149 as letters that he wrote to the C. W. Hall Company and the Humble Oil and Refining Company in regard to tax assessments. They

[13] The receipts were usually signed "D. C. Chapa by ——," by whoever prepared the receipt. (VII, 2373).

were mailed by Heras from the post office in Benavides and were addressed to Houston, Texas (VII, 2371–2373; VIII, 2419–2422).

Unlike the practice at San Diego, the taxpayers' payments were totaled on an adding machine and only the total amount, instead of each individual check, was written on the face of the deposit slip before either Mrs. Gonzales or petitioner Chapa deposited the receipts at the Texas State Bank at Alice (VII, 2378).

Checks drawn on B.I.S.D. funds after July 1951, were prepared by and in the office of petitioner Oscar Carrillo and Mrs. Velia Oliveira Bridges, and to Heras' knowledge only those two prepared checks while Heras was employed in Benavides [14] (VII, 2368, 2375). Regarding specific fictitious checks drawn after July 1951, Heras identified several as having been prepared by petitioner Oscar Carrillo, endorsed by petitioner Saenz, and countersigned by petitioner Parr (VIII, 2409).

As to Government Exhibits 17 A–P, which were checks prepared by Heras to the order of fictitious persons and countersigned by Parr, Heras testified that he removed them, together with copies of one or two annual reports, (Govt. Exs. 18–21) and the tax collector's cash book, from the School District office in Benavides in late 1952. Heras took these items to his private office in the Heras Building in Benavides. Several months later they were delivered to either an internal revenue agent or to a grand jury (VII, 2355–2357).

Heras concluded his direct testimony by recalling an incident with petitioner Chapa at the Benavides

[14] It was customary to knock on the door of Carrillo and Mrs. Bridges before entering (VII, 2375).

office in the latter part of 1951. Chapa instructed Heras to contact an insurance agent and discuss the matter of bonding the tax collector and the deputy tax collectors for the B.I.S.D. Heras reported to Chapa that the insurance company would have to examine the tax rolls and tax collections, and Chapa, upon learning this, discarded the idea of insurance (VIII, 2423–2424).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE MAIL FRAUD QUESTION

In their principal brief, petitioners demonstrated that the mailings charged as offenses in this case were not "incident to" any part of the alleged fraudulent scheme, *Pereira* v. *United States*, 347 U.S. 1, and that, accordingly, they did not fall within the scope of the mail fraud statute as mailings "for the purpose of executing such scheme" (18 U.S.C. § 1341). The mailings were not a step in the consummation of the fraud, and they did not in any way constitute a misuse of the federal mailing facilities. Accordingly, petitioners committed no federal offense.

The government concedes its fundamental difficulty with this case by saying that it involves a "unique situation" and that "there is no reported case exactly like this" (Resp. Br. 53). To meet petitioners' objections that no violation of the mail fraud statute was proved, counsel for the government have attempted to rewrite the indictment and the record. They invent "implied representations" which exist neither in the maidings themselves, nor in the indictment or the record, nor in the law or common sense; and they seek to induce this Court to accept a new theory of mail violations which would make federal crimes out of innumerable forms of local offenses.

First, the government says that the notices and receipts sent out by the BISD were in execution of the alleged scheme because they contained "implied misrepresentations" that the tax money was being and would be used for school purposes (Resp. Br. 46). Second, it says that the bills, checks, receipts, etc. taken from or placed in the mails "would almost certainly have been different but for the scheme" (Resp. Br. 27). And finally, it says that the use of the mails was in execution of the scheme because the success of the scheme required taxpayers who were non-residents and who would therefore, by hypothesis, use the mails, and who (according to the government) would be "unlikely to check on the nature of local expenditures" (Resp. Br. 26).

These theories are not reflected in the indictment. They were not among the issues at trial. No evidence was introduced addressed to them. They were not argued in the trial court. And, as we shall show, there is utterly no basis for them.

The government's true contention, upon which the indictment was framed and the issues tried, is that petitioners embezzled from a fund which was in part accumulated through the use of the mails. Since some of the money in the BISD accounts had been transmitted by mail, or notices relating thereto had been sent by mail, the embezzlements from the accounts are said to be a federal offense.

There is no charge or claim that the mails were used in the process of embezzlement. There is no charge in the indictment or the record or evidence that the taxes assessed and collected were unlawful or excessive or were in any way affected by the embezzlement. The sum and substance of the indictment, and the only propositions as to which there is any evidence are (1) that petitioners were engaged in a scheme to misappropriate monies out of the BISD funds by means of checks to fictitious payees, etc.; and (2) that some of the petitioners were also engaged in discharging various official duties, in accordance with law, of collecting taxes and that, as a result of these tax collection functions of petitioners, certain taxpayers in Houston received and deposited mail from and to the BISD.

There is no charge in the indictment and not a word of evidence to the effect that any of the accused mailings was influenced by the alleged fraudulent scheme, or that tax rates, assessments or collections, in total or in the specific instances charged in the indictment, were affected in any way by the scheme. There is, in short, no bridge whatever between the accused mailings and the scheme to embezzle. The only common factor is that the embezzlements were out of funds resulting from the proceeds of taxes; and it is this factor that was the basis of the indictment and trial.

Now, however, the government has recognized the inadequacy of this theory to support a mail fraud prosecution. It has recognized that this theory would convert into a federal offense every situation in which, for example, a doctor's secretary who sends out his bills and receives payment from patients, dips into his petty cash for her own benefit. (See Pet. Main Brief 29-30.) Petitioners now apparently concede that these embezzlements would not be a violation of the mail fraud statute, because they would be thefts "unconnected with mailing" (Resp. Br. 45). They would become violations of the mail fraud statute, the government concedes, only if the secretary should "increase the amount of the bill so as to provide a margin for peculation in the petty cash fund". The violation would result in such a case, they argue, "since the mails, through which the payments were received, would be used to execute the scheme". (*Ibid.*)

Accordingly, the government has recognized that the convictions in the present case cannot be sustained merely because the mails were used in the process of collecting taxes. Yet, this is the theory of the indictment and the basis upon which the case was tried. Petitioners had no notice of any other theory, and neither petitioners nor the government offered evidence on any other theory. This will become evident in our analysis of each of the claims now advanced by the government for the first time.

These theories, which are not reflected in the indictment or advanced by the government in the trial court or the Court of Appeals, only demonstrate anew the basic defect of the government's case. We shall show that the government cannot justify its prosecution of this case by any of them.

A. Implied Misrepresentations

The government now asserts that the mailings were violations of the mail fraud statute because they contained "implied misrepresentations" that all school funds were or would be used for school purposes (Resp. Br. 46, 26).

In the first place, the indictment nowhere alleges that the checks, correspondence or other matter contained implied or actual misrepresentations. The substantive counts of the indictment are concerned with taxpayers' checks, notices of hearings, correspondence concerning taxes and payment of an oil company's bill, the use of the mails all taking place in Houston.

Secondly, when the individual substantive counts of the indictment are examined, it becomes even more obvious that there is no basis for the claim that the mailings "contained" representations or misrepresentations (Resp. Br. 46). Counts 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16 all charge mailings by taxpayers *to* the BISD, and counts 17 and 19 charge mailings by a creditor *to* the BISD. Obviously, none of these mailings could possibly contain implied misrepresentations by the petitioners. Of the remaining counts, Count 1 is a letter advising a taxpayer of reduced valuation fixed by the separate Board of Equalization; Counts 2 and 5 were notices of hearings before that Board; Count 7 is a letter from the BISD transmitting an "Auxiliary Tax Notice"; and Count 18 is a check of BISD in payment of a bill for gasoline. In Appendix B we have reprinted each mailing which is charged as an offense. It is obvious that none of these can plausibly be said to contain or imply any representations as to the application of tax proceeds.

Thirdly, even if each of the counts had been a notice of tax assessment, it is fantastic to predicate federal jurisdiction on the assumption that each notice contains the "implied" representation that no money resulting from tax collections will be stolen or misappropriated. As we have noted, the indictment made no such allegation, and there is no evidence supporting such an implication. The obligation to pay taxes is not dependent upon the custodianship of the funds. And obviously, there is no evidence that any taxpayer believed that there was such a representation or that he relied on it, or that he would have acted differently if he had known that funds were being stolen.[1]

In its brief, the government has attempted to convey the impression that the mailings charged as offenses are mailings by the petitioners. Thus the government says (Resp. Br. 26):

> "Many of the *mailings themselves* contained false representations. The tax notices and receipts mailed to taxpayers impliedly represented that all purported school expenditures were lawful, and that all school funds were, and would be, used for school purposes. That representation was plainly false." (Emphasis supplied.)

In referring as quoted above to alleged misrepresentations in *"the mailings themselves"*, the government seems to be creating confusion as to the nature of the charges in the indictment. For the tax notices, receipts and reports to the State which the government refers to are *not* the mailings alleged to be offenses in the indictment. The government has apparently for-

[1] Representatives of taxpayers said they paid their taxes in September to get the benefit of a discount provided by law (*E.g.*, V, 1344; XI, 3725-3742).

gotten that all but five of the 19 substantive counts of the indictment are based upon mailings by taxpayers or creditors, not mailings by petitioners or the BISD. As for the remaining five substantive counts, only one involves correspondence concerning taxes, none are receipts, and none are reports to the State.

We pointed out in our main brief the difficulties with the indictment stemming from the fact that, in order to place venue at a point distant from petitioners' homes, the indictment was inverted and the offenses charged were exclusively the placing of matter in the mails or taking it from the mails in Houston by taxpayers and creditors and not the petitioners (Pet. Br. 23-24). Now we find the government attempting to have its cake and eat it—to argue the case as if the indictment had been based on mailings by the petitioners.

In any event, the contention that a tax notice or receipt impliedly represents that taxes will be or have been used for lawful purposes demonstrates precisely the vast potential expansion of federal jurisdiction which petitioners contend is implicit in this case. Take the case of a bookkeeper who embezzles money from her employer's funds, part of which have arrived through the mails. Under the government's theory, this is mail fraud because the employer's bills contain the implied representation that money sent in will be applied exclusively to the use of the employer.

In fact, the government's far-fetched effort to argue that the mailings "imply" statements which they do not contain starkly reveals the government's true theory of this case: if the mails are used in connection with the collection of a fund and if there is subsequent embezzlement from that fund, this, without more, is

mail fraud, however lawful, proper or necessary may have been the use of the mails and the creation of the fund.

Under the government's theory, every solicitation of funds, every bill, notice or receipt, represents that money sent in will be used for the right purposes. Every tax notice impliedly has written on it the reassuring statement, "We're not going to steal the money". If the tax money is later misappropriated, then it becomes a case in which money was obtained through the mails by false representations. The government's theory of implied misrepresentations would bring every form of local misappropriation into federal court.

B. Whether the Correspondence and Checks Would Have Been Different

The government also asserts that the mails were used in execution of the scheme because "had there been no fraud, the tax bills, checks, letters and receipts sent through the mails would almost certainly have been different", and "taxes might very well have been lower" (Resp. Br. 49). These statements of the government have no basis whatever in the indictment or in any evidence presented at the trial.

As we pointed out in our main brief (Pet. Br. 30-33), the indictment did not allege and the prosecution did not attempt to prove that the tax valuations or rates were illegal or unjustifiably high. Obviously, therefore, the petitioners had no opportunity or occasion to meet such an allegation. On the contrary, the prosecution's theory was that the tax money should have been used entirely for school purposes instead of being diverted to the use of petitioners (XIV, 4988,

5006-5007; Resp. Br. in Ct. of App., 63-64). Petitioners had no notice of the government's present theory. They had no opportunity to make a defense and to present evidence to refute the government's theory. The whole theory of the prosecution in the trial court was that the BISD was defrauded, not that the taxpayers were subjected to exorbitant taxes. The government cannot now rewrite the indictment. *Stirone* v. *United States*, 80 S.Ct. 270.

On the record and under Texas law, every cent paid by taxpayers could have been used lawfully by the BISD. *Madeley* v. *Trustees of Conroe Independent School Dist.*, 130 S.W. 2d 929 (Ct. Civ. App. Tex. 1939). Moreover, the BISD was two and a half years in debt when the alleged scheme terminated in February, 1954 (X, 3435). The scheme consisted of failure to use all of the BISD funds for School District purposes. Allegedly, the BISD was defrauded, but this does not demonstrate that taxes would have been lower but for the scheme.

The record shows that valuations of mineral property were fixed by the Board of Equalization, a body required by law to be separate from the Board of Trustees of the BISD. *St. Louis S.W.Ry. Co. of Texas* v. *Naples Independent School Dist.*, 30 S.W. 2d 703 (Ct. Civ. App. Tex. 1930). See also art. 2791, R.C.S. of Texas. The Board acted on the recommendation of an independent engineering and appraisal company, the Thomas Y. Pickett Co.[2] If a taxpayer thought

[2] This company specialized in evaluating mineral interests and operated in many areas in Texas. Gordon Humphreys, an employee of the Pickett Co. called as witness by the prosecution, testified that valuations were made by his company and then submitted to the Board of Equalization (VII, 2248-2252).

the valuation too high, he could protest to the Board of Equalization and thereafter appeal to the courts. Thus the evidence in the record on valuations shows they were not fixed by persons connected with the alleged conspiracy. The maximum rates were fixed by statute (Art. 2784e, R.C.S. of Tex.). There is nothing at all to suggest that the fixing of valuations or rates was in any way affected by the conspiracy. Nor is there any indication that rates were lowered after the conspiracy ended. The unsupported assertion of government counsel as to what "might very well have been" is not evidence; it is not based upon any charge in the indictment; and it should be disregarded by this Court.

C. Non-residents Unable to Check Local Conditions

The government's third theory is that petitioners' alleged scheme depended upon the mails for its success because 75% or more of the tax revenues came from non-resident oil companies which "had no real interest in community affairs" (Resp. Br. 53) and "paid taxes to many different school districts, necessarily dealt with them by mail, and were unlikely—even unable—to check on the financial conditions of local school districts, the nature of local expenditures, and the causes behind high local taxes" (Resp. Br. 43).

In the paragraphs of the government's brief from which the above excerpts are quoted, no citation to the record can be found. The reason is simple: There is nothing in the record to show that the non-resident taxpayers had no interest in community affairs or were unlikely or unable to check on local conditions. On the contrary, the record shows that many non-resident tax-

payers owned large producing oil fields in the BISD, of a type which required on-the-spot supervision and attention (VII, 2227-2232). Some of these non-residents were therefore regularly present in Duval County and had as much opportunity and reason to investigate local conditions as residents. And it is difficult to believe that two of the biggest oil companies in the world—Humble Oil & Refining Co. and the Texas Co. —were unable to check on local conditions. These giant companies, paying large amounts, had the incentive, the personnel, and the ability to check on local finances. It should be added that the duty to pay taxes was imposed by law, and could in no event have been affected by knowledge of local conditions; taxes could be challenged only by appropriate state procedures.

The alleged scheme did not depend in any way upon the method by which the tax proceeds were realized. The fraud consisted in issuing checks of the BISD to fictitious payees and to persons who performed no services. The collection of taxes from which funds were misappropriated was effected in the usual variety of ways. While mineral interests, owned largely by non-residents, represented 75-85% of the taxes by value, there were a large number of local property owners who paid taxes. The manner in which they paid their taxes did not affect the scheme in any way.[3]

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[3] In only two of the counts (15 and 16) does the government attempt to show a relationship between the use of the mails and the misappropriation of funds. This attempt is erroneous, as we shall show, and it involves only a single petitioner, Chapa.

Chapa, according to the government's theory, on two occasions caused a taxpayer's check to be cashed at a bank and appropriated the proceeds. There is no evidence that this was a part of the

Whether taxpayers are residents or non-residents and whether they could or could not check on the custodian ship of funds is utterly irrelevant to the question whether the mails were used in execution of a scheme to defraud. The essential fact is that the collection of taxes and the fraudulent scheme were separate and distinct matters.

D. The Government's Real Theory

The government's brief lays bare its real theory of this case. Stated very simply, the government is saying that some of the petitioners participated in the col-

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general scheme, or that any other petitioners were aware of it, or that it represented anything but an activity of Chapa individually. But more important than this is the fact that it did not constitute a violation of the mail fraud statute. In the first place, the use of the mails by a taxpayer in mailing checks to the BISD was not in execution of the scheme any more than in the earlier counts. In the second place, the alleged misappropriation did not occur until the payments had left the mails. The checks came to Chapa in regular course in his capacity as tax collector. As such he was authorized to cash checks that came to him at any bank he wished; indeed, he had no legal duty to accept tax payments in any form other than cash. See, *e.g.*, *Muldrow* v. *Texas Frozen Foods, Inc.*, 299 S.W. 2d 275 (Ct.Civ.App. Tex. 1957); *Scisson* v. *State*, 51 S.W. 2d 703 (Crim. App. Tex. 1932). The embezzlement, if any, occurred thereafter when Chapa appropriated the cash. The checks in question were credited on the tax rolls to the account of the taxpayer (Govt. Ex. 34, 35, 42 and 43). If Chapa subsequently converted the cash to his own use, this was embezzlement of BISD funds. It was not a fraudulent use of the mails. The use of the mails had ended before Chapa misappropriated the cash.

In *Scisson* v. *State*, *supra*, the tax assessor-collector of an independent school district deposited a taxpayer's check in his own bank account, and the taxpayer was not credited with payment. The court held that the collector had not embezzled the check, but only the proceeds thereof.

lection of taxes; that this built up a fund belonging to the BISD; that certain petitioners embezzled from this fund; and that therefore every mailing in the process of collecting taxes is mail fraud. An examination of the indictment shows this theory very clearly, for the substantive counts of the indictment are obviously selected out of many possible mailings in order to show instances of the tax collection process.

On the government's theory, the mail fraud statute would acquire a fantastic scope. Anyone who embezzled from a fund collected in part by mail would be guilty of mail fraud. The doctor's secretary, the office boy, and even the traveling salesman who buys a drink with his employer's credit card would be caught up in the web. And in the present case, every mailing—even the most innocent—would be a separate offense; the total number of offenses chargeable to these petitioners could well be multiplied into the tens of thousands by charging, as this indictment does, each separate mailing in connection with the process of tax collection, however innocent, as a separate crime.

The consequence of the government's theory is also to catch up in the indictment and to convict on substantive charges a variety of persons who had no conceivable relationship to the crimes alleged. All of the eleven petitioners were convicted of conspiracy (Count 20) on a charge that, as we shall show, is insupportable. But all except two were also convicted on substantive counts of mail fraud violation.

Analysis of the substantive convictions vividly demonstrates the startling results that can be obtained if, as the government's case requires, it should be held that the use of the mails in connection with the collection of a fund converts misappropriations from

that fund into a violation of the federal mail fraud statute. For example:

1. Petitioners Parr, Chapa, Donald, Garcia, Saenz, and the Texas State Bank were all convicted on Counts 17 and 18, as well as others. These counts charged as crimes mailings involved in the rendition of bills by and payment to Continental Oil Co. for gasoline. They were based on evidence that two of the petitioners, Oscar Carrillo, Sr. and Garza had obtained gasoline from the service station with which BISD had an account; that they used some of this gasoline for personal purposes; and that they charged the gasoline on BISD's credit card. There is not one word of evidence connecting the other petitioners with this conduct by Carrillo and Garza. It was obviously a frolic of their own, and not part of the alleged scheme. As we have shown in our main brief (Pet. Br. 23),[4] this was not a violation of the mail fraud statute; but the sweeping nature of the government's approach resulted in the conviction not only of Oscar Carrillo, Sr. and Garza, but also of many others who had no connection with the misconduct or with the mailings alleged. On the government's theory, however, they are all guilty because the use of the mails incident to tax collection placed all of the funds in the federal preserve; therefore, any misuse of any part of those funds.

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[4] Significantly, the government makes no real effort to defend counts 17, 18 and 19, the Conoco counts. In footnote 27 of page 52 of its brief, the government, in a labored, lengthy, incomprehensible and somewhat apologetic statement, attempts to argue that the use of the mails was incident to the alleged misappropriation of gasoline; if the bills had not been paid, the gas station would not have allowed Carrillo and Garza to obtain gasoline. Our position is that the misappropriation occurred when the gasoline was put into the cars, not later on. Incidentally, the government, in this same footnote, refers unjustifiably to "petitioners" although only Oscar Carrillo, Sr. and Garza were involved.

even though it did not involve any use of the mails, is a violation of the federal mail fraud statute; and *further*, any person who had any part in the collection or custody of those funds is subject to prosecution for any and all misappropriations thereof—*under the federal mail fraud statute!*[4a]

2. Counts 15 and 16, involving checks allegedly cashed by petitioner Chapa at a non-depository bank, also illustrate the shotgun effects of the government's theory. At most, this might have resulted in a subsequent misappropriation by Chapa, but there is nothing to show a connection with any other petitioner. Even as to Chapa, these counts do not allege a case of mail fraud, as we have shown above. Not only Chapa, but also the Texas State Bank, the San Diego State Bank, and five other individual petitioners were convicted on this incident.[5]

3. The Texas State Bank was convicted on all counts. Donald, its cashier, was convicted on all except Counts 15 and 16 involving Chapa alone, described above. The Texas State Bank was the official depository of the funds of the BISD. Its involvement and that of Donald had nothing whatever to do with any of the mailings charged as offenses. They received from the BISD tax collector the proceeds of his collections and paid out funds drawn by check. Assuming their culpability as to the payments, it is nevertheless impossible

[4a] The situation of such persons is to be distinguished from that of Brading, the second defendant in *Pereira*, who, unlike the persons here, "was a participant in the fraud from beginning to end." 347 U.S. 1, 10.

[5] One petitioner was convicted on count 15 but not count 16 because of a prior acquittal on that count. The remaining four individuals, as well as Chapa and the Texas State Bank, were convicted on both counts. San Diego Bank was convicted on 16 but not 15.

to sustain their indictment or conviction except on the theory, which the government apparently seeks to vindicate, that since there were mailings in connection with the collection of taxes, any acts related to the misappropriation of money from the fund are violations of the federal mail fraud statute.

It will be noted that the convictions referred to are not for conspiracy, but for substantive violations of the mail fraud statute. Each of the petitioners was also indicted and convicted on the conspiracy count (count 20). The conspiracy count alleged solely a conspiracy to commit the "offenses" alleged in count 1 of the indictment. The government now asserts (Resp. Br. 47, note 24) that although the conspiracy count alleges only a conspiracy to commit the offenses in count 1, this means the entire scheme and its various elements. But there could be no proper charge of conspiracy except a conspiracy to commit a federal offense. A scheme to defraud is not a federal offense. The only offense charged in count 1 was the taking from the mail of a letter signed by Diego Heras giving notice of the results of a hearing before the Board of Equalization. In its brief in the Court of Appeals (p. 126) the government, with more candor than it has shown in its present brief, admitted that the conspiracy count failed to mention as objects of the conspiracy the offenses in counts 2 through 19 because of a typographical error:

> "The words 'first count' were plainly a clerical or typographical error for 'first counts,' (or perhaps even 'first nineteen counts,' which would have the same meaning). . . ." Govt. Br. in Ct. of App. 126.

The government's present argument cannot now make the conspiracy count applicable to these remaining counts.

II. THE GRAND JURY TESTIMONY OF HERAS

In their main brief petitioners demonstrated that the witness Heras was so untrustworthy and self-contradictory that the petitioners showed a "particularized need" for disclosure of Heras' grand jury testimony, and that the trial court erred in denying petitioners' request for access to that testimony. In its brief the government first attempts to avoid the issue of particularized need by asserting that petitioners erroneously demanded Heras' testimony as a matter of absolute right. The record shows, however, that petitioners had no opportunity or occasion to state their position. The trial judge felt he had no power whatever to grant access to grand jury minutes. On this point alone the court committed reversible error.*

On the merits of petitioners' request for access to Heras' grand jury testimony, the government does not challenge petitioners' basic proposition: A showing that the testimony of a witness at the trial is important, coupled with a demonstration of relevant contradictions and a showing of untrustworthiness, establishes the necessary basis for access to his grand jury testimony. The government, however, says (1) that in the present case, there is no transcript of the wit-

*The government says that the trial judge was not requested to examine the transcript. We do not believe that examination of a transcript is required as an absolute rule. It is only one part of the process of establishing particularized need. It is particularly appropriate to examine the transcript when the showing of need is based upon the mere allegation of contradictions between trial testimony and grand jury testimony. In this case, however, the showing of need was based upon specific evidence of Heras' untrustworthiness and contradictions between his trial testimony and prior statements other than his grand jury testimony. Petitioners' need for the transcript was amply established without need for the trial judge to consult the transcript.

ness Heras' testimony and therefore petitioners' request is moot; (2) that Heras was not really an important witness; and (3) that Heras was not really untrustworthy.[7] We shall consider these arguments of the government in order.

A. Existence of Transcript of Heras' Testimony

With respect to the existence or non-existence of a transcript of Diego Heras' testimony before the grand jury, the government asserts (Resp. Br. 55) that it has set forth in Appendix A of its Brief "three documents that fully establish that Heras' grand jury testimony was not transcribed", and on p. 56 it says that "On the basis of these documents" there can be no question that Heras' testimony was not recorded.

This Court need not decide whether or not a transcript existed in order to pass on petitioners' rights. As we showed in our main brief, if petitioners had a right of access to the testimony, the trial court, if it found there was no transcript, would have discretion to permit disclosure by other means. Moreover, we respectfully submit that this issue is not properly before this Court. We further respectfully submit that the procedure utilized by the government in this Court with respect to this matter is inappropriate and impermissible.

We do not object to the Solicitor General's advising this Court that he has concluded that no transcript exists, despite the thrice-repeated statement of Mr. Wil-

[7] Significantly, the government has abandoned the arguments in the opinion below that Heras' grand jury testimony would be merely cumulative evidence of his propensity to contradict himself and that Heras might be reluctant to testify in the future if his grand jury testimony were disclosed.

key to the contrary in the trial court and the consequent action of petitioners. The Solicitor General, we believe, had a duty to report his conclusions to the Court.

But correspondingly, we believe that the Solicitor General should have recognized that if this issue were determinative of petitioners' rights, petitioners would be entitled—particularly in view of the extraordinary circumstances here presented—to an opportunity in a new trial to investigate this strange situation; to examine witnesses, including counsel who asserted that the transcript existed; and fully to satisfy themselves on the subject. Indeed, we respectfully suggest that the trial court would also be entitled to an explanation of this extraordinary and startling situation.

Accordingly, we object to the submission to this Court of the materials in the government's Appendix A, and we request that they be eliminated from consideration by this Court, as irrelevant and as improper. Apart from the procedural defect, specific factual deficiencies in the government's submission on this question prompt petitioners to state that, were the issue of the existence or non-existence of a transcript to become decisive, they would demand a judicial trial of the issues which the government seeks to foreclose by its *ex parte* submission to this Court. The more important of these areas are as follows:

1. Strangely the government is silent as to whether there are notes, memoranda or a summary of Heras' grand jury testimony, although we raised the question in our main brief.

2. The affidavits of the two court reporters are singularly irrelevant if the government is correct that Heras

appeared before the grand jury only on March 6, 1956. Both of these men swear that they recorded the testimony of witnesses prior to March 6, and didn't record Heras' testimony (although Leydens' affidavit is somewhat less than satisfactory on the point (Resp. Br., 86)).

3. The only direct evidence as to Heras' appearance is the grand jury assignment sheet which was apparently kept by Helen Ainsworth, a member of the jury —not a court official. No affidavit by Miss Ainsworth was filed; nor was there submitted any statement as to the identity of government lawyers who were in the grand jury room, who would presumably be in the best position to attest the facts.[8]

B. Particularized Need for Heras' Testimony

Petitioners' contention that they showed a particularized need for access to the grand jury testimony of the witness Diego Heras rests on the proposition that he was (a) a vitally important witness, and (b) untrustworthy and unreliable. The government's answer to these contentions is to assert that Heras was not a "key" witness and he was not untrustworthy. We shall show that these assertions by the government are based on demonstrable misrepresentations of the record.

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[8] We are not persuaded that the government is now entirely clear as to the witnesses before the grand jury. On page 57, note 29 of the government's brief, government counsel seem to imply that Benson testified before this grand jury and they attempt to score a point by charging that petitioners did not seek to determine the substance of Benson's testimony "by other means". Petitioners were advised in the trial court that Benson had testified before the grand jury in another case involving Parr, but had not testified before this grand jury. The Government's note either overlooks this fact or indicates continued uncertainty as to the witnesses who testified before the grand jury.

(1) Whether Heras was a key witness

The government, in attempting to show that Diego Heras was not a vitally important witness, repeatedly states that his testimony was admitted for a limited purpose and not to prove the substantive offenses:

> "Since the statute of limitations had run as to all substantive offenses committed prior to September 1, 1951, the testimony of both Benson and Heras was admitted only to show the origin of the scheme and the fact that the continuing conspiracy began before the September date. The trial judge gave the jury appropriate instructions to that effect (XV, 5505). (Resp. Br. 12, n. 8.)
>
> * * *
>
> ". . . Furthermore, his testimony related only to the background of the scheme and not to any offenses unbarred by the statute of limitations. (Resp. Br. 29).
>
> * * *
>
> ". . . Heras' testimony was admitted to show only the background of the scheme, and was so limited by the trial judge. . . ." (Resp. Br. 31).
>
> * * *
>
> ". . . The prosecutor's decision [not to record Heras' testimony] is particularly understandable in view of the fact that Heras' testimony related only to the background of the scheme, since the events of which he had direct knowledge occurred prior to the limitations period (see *supra*, note 8, p. 12; *infra*, p. 70) (Resp. Br. 62).
>
> * * *
>
> ". . . Heras' direct testimony dealt chiefly with the events prior to July, 1951 when he ceased performing secretarial functions for the School District, and it was admitted for the specifically limited purpose to show the origin of the scheme to defraud and not as proof of the substantive offenses." (Resp. Br. 70).

These repeated statements in the government's brief[9] are flatly wrong. Heras did testify to the substantive offenses; he did testify in great detail with respect to events subsequent to September, 1951, and his testimony in these respects was admitted without limitation by the court. Under the court's charge, the jury could have convicted the petitioners on the basis of his testimony alone.

First. Of the 19 substantive counts of the indictment, only five charged the taking from the mails in Houston of letters mailed from Benavides; the remaining offenses were mailings by taxpayers and a creditor. Of the five, two were communications signed by Diego Heras, dated *after* September 1, 1951. At page 2420 of the record (Vol. VIII) the prosecutor, Mr. Wilkey, asked Heras the following questions about these two counts and received the following answers:

> Q. [MR. WILKEY] I show you Government's Exhibit 149 and ask you what that is? [Exhibit 149 is the letter charged as the offense in Count 1.]
>
> A. [HERAS] This is also a letter written by me to the Humble Oil & Refining Company.
>
> Q. Dated what, sir?
>
> A. Dated September 26, 1952.
>
> Q. And without reading the exact words of the letter, what does it concern?
>
> A. Tax assessments.
>
> Q. Now, then, how was this letter transmitted to the Humble Oil & Refining Company?
>
> A. By mail.
>
> Q. Where did you mail this letter, Government's Exhibit 149?
>
> A. From Benavides, Texas.
>
> Q. Where did you mail this letter Exhibit 148 [charged as the offense in Count 7]?

[9] The government also made a similar assertion in its brief in opposition to certiorari p. 20.

A. From the same place.
Q. The post office in Benavides?
A. Yes.
Q. To what city?
A. To the City of Houston, Texas.
Q. Houston, Texas?
A. Yes, sir.
MR. WILKEY: We offer in evidence Government's Exhibits 148 and 149.

Thus Heras gave direct proof of two of the substantive counts. We cannot understand how Mr. Wilkey, who personally elicited this evidence, can square the position asserted in the brief in this Court with this evidence.

Second. The government seeks to create the impression (Resp. Br. 70) that Heras ceased working for the School District in July, 1951. Actually, from July, 1951 through December, 1952, Heras continued to perform services as Deputy Tax Collector-Assessor (VII, 2391). And although he left that job after December, 1952 he continued to work for the BISD during the first three months of 1953. In other words, Heras worked for the BISD for 18 months beyond the September 1, 1951 cut-off date. Heras gave much important and detailed testimony covering events subsequent to September 1, 1951. He personally prepared the tax rolls for 1952 (VII, 2369) and identified specific fictitious checks dated as late as November, 1952 (VIII, 2409). In no place did the trial judge limit the purposes for which the jury could consider this testimony of Heras.

Third. The government says that Heras' testimony as to events before September 1, 1951 was admitted only to show the origin of the scheme, citing the trial court's instruction to the jury on page 5505 of Volume

XV. Two points must be noted in this connection: 1. The judge made no ruling as to Heras, as the government implies, but directed his instruction generally to evidence relating to the period prior to September 1, 1951. 2. The judge's instruction ascribed the utmost importance to evidence concerning that period. That evidence, he charged, could be used as the basis for finding the existence of "a scheme and artifice to defraud". He went on to say that the government was required to prove that the scheme was still in effect after September 1, 1951, when the mails were used as charged in the various counts.[10]

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[10] The court's entire charge on this point read as follows (XV, 5505):

> "You are further instructed that although certain documentary evidence dated prior to September 1, 1951, as well as testimony relating to the actual transactions prior to said date, has been admitted in evidence in this case, such evidence and testimony can be considered by you only for the limited purpose of determining whether or not a scheme or artifice to defraud existed, as alleged in the first 19 counts of the indictment, and whether a conspiracy existed as alleged in the 20th count of the indictment. Even if you should find and believe beyond a reasonable doubt that because of such evidence, documents, acts or transactions prior to September 1, 1951, there existed a scheme and artifice to defraud the Benavides Independent School District and others prior to that date, as alleged in the first 19 counts of the indictment, you are charged that such evidence, standing alone, is not sufficient to authorize conviction of the defendants or any of them. The burden of proof is on the government to show by evidence beyond a reasonable doubt that the scheme and artifice to defraud was still in existence when the mails were used after September 1, 1951, and on or about the dates alleged in each of the first 19 counts of the indictment. If you do not believe from other evidence involving dates after September 1, 1951, that the aforesaid scheme and artifice to defraud continued after that date and on or about the dates alleged in each count of the indictment, or if you have a reasonable doubt thereof, you will acquit the defendants and say by your verdict 'not guilty'."

Fourth. At another point in his charge, the court made plain that the jury was authorized to convict on the basis of Heras' testimony *alone*. The court told the jury that "testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence." After two intervening sentences, he then told the jury, "You are charged that the witness Diego Heras is an accomplice by his own testimony". (XV, 5493).[11]

The necessary effect of this charge was to concentrate the jury's attention and interest on Heras and to make his story a controlling factor in the case.

(2) Whether Heras was an untrustworthy witness

In its brief, the government asserts that all of Heras' testimony and statements disclose only a single minor

[11] The following is the complete text of a portion of the judge's charge from which we have quoted above (XV, 5493):

"An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, unless you believe the unsupported testimony beyond all reasonable doubt.

"Now, in that connection, you are charged that the witness Diego Heras is an accomplice by his own testimony. The witnesses William M. Benson, Amador Caballero, Sr., Amador Caballero, Jr., Carl Williams, Mrs. Edna Fitch and Mrs. Christine Ray, or any of them may be considered accomplices if you believe the evidence sustains it."

inconsistency—and that there are no conflicts between his testimony and his prior statements (Resp. Br. 72-78). We had believed that the unreliability of Heras was the one thing which on the present record no one could dispute. Because it is now asserted that there was only one minor inconsistency in all of Heras' testimony and statements, we have felt obliged to print in an Appendix to this brief a set of excerpts from Heras' testimony and statements to show what sort of a witness he proved to be.

In evaluating Heras' reliability, it should be recalled that he was an admitted forger and embezzler (VII, 2338, 2345); he was an accomplice and co-conspirator (XV, 5493); (I, 27); he helped himself to large amounts of the District's money (VII 2534-2650); he did not report these lootings in his income tax; and, in fact, paid not a penny of income tax in 1949, 1950 or 1951 (IX, 3127-3128); he was not prosecuted for income tax evasion (VIII, 2599-2600); he was granted immunity from prosecution by the state in return for testimony against petitioner Parr (IX, 3118, 3119); and he was not prosecuted by the federal government for his part in the alleged scheme. Heras himself summed it all up when, referring to the period of many years during which he worked for the School District, he testified that "We were a lot of common liars in Duval County during those years." (IX, 3057).

The conflicts and inconsistencies in Heras' testimony relate to matters of his truthfulness, his reliability, and specific facts and events essential to the government's case. For example, his discussion of his own financial transactions, summarized in Appendix A, is informative. In statements made to the government and again in his testimony-in-chief at the trial, Heras

maintained that he did not profit by the fraudulent scheme. He claimed that he received nothing above his regular salary and travel expenses. On cross-examination, however, Heras was forced to admit that he had received large amounts of School District money. Sometimes he deposited two or three "salary" checks for a single month. He obtained other large checks which he claimed were "advances and loans" never paid back.[12] He also deposited large amounts of cash. In 1949, a year when he claimed his total remuneration from the BISD was approximately $3300, his bank bank account showed over $12,000 in deposits.

Heras supplied the principal evidence to link petitioner Parr to the cashing of checks. But on an earlier occasion, Heras suggested that fictitious checks were prepared without Parr's knowledge, and by deceiving him. And even on the vital question of Parr's role in BISD affairs, Heras contradicted himself. On several occasions he said that, to his knowledge, Parr had never held any official position with the BISD. Thus he implied that Parr's activity in countersigning BISD checks, whether or not fictitious, had no explanation except as part of the fraud. On another occasion, however, Heras said that he knew Parr was supervisor for the financial department of the school district and that Parr was on the BISD payroll.

In discussing Heras' two affidavits concerning the "Denton incident", the government says these were only "minor inconsistencies", (Resp. Br. 78), and asserts that the inconsistency "was not with Heras' trial testimony, but between two of his statements" (Govt.

[12] The Court of Appeals said (note 8): "It was not disputed, however, that these 'advances' greatly exceeded the salary in a given period and were never paid back in any substantial amount."

Br. 77). In truth, the inconsistencies involve Heras' trial testimony as well as his earlier statements. On April 9, 1953, Heras gave a sworn statement to two FBI agents concerning the delivery of money to certain persons on behalf of petitioner Parr (IX, 3173-3176). Two days later in a second sworn statement, Heras retracted his first statement, saying that it was "false and . . . I knew at the time I furnished the information that it was false." At the trial Heras said that his first affidavit was "relatively correct" and that the second affidavit was "not the way it happened" (IX, 3184). The petitioners are entitled to find out which version he gave to the grand jury.

The Court of Appeals, which held against the petitioner on all issues, acknowledged that there were "numerous inconsistencies and contradictions" between Heras' testimony and his prior statements, and concluded that he was "far from trustworthy". The evidence to support these statements was overwhelming.

III. ABUSE OF PROSECUTORIAL FUNCTION

In our main brief, we suggested that the prosecution by a series of actions neglected its primary function to see that justice is done. We contended that these actions, considered in the aggregate, presented a question as to whether this is an appropriate case for the Court to exercise its supervisory powers over the conduct of federal criminal trials. This question was not and could not have been presented in our petition for certiorari. Our determination to present the matter to this Court depended upon an evaluation of an aggregate of points bearing upon the prosecution of this case; and we did not reach a final decision until the

belated disclosure of the prosecution's asserted failure to record Heras' grand jury testimony.

The government contends that its failure to record that testimony was justifiable because Heras testified before the grand jury prior to this Court's decision in *Jencks v. United States*, 353 U.S. 657. The government states:

> "It was only after the *Jencks* decision that there were widespread demands by federal criminal defendants for production of grand jury transcripts." (Resp. Br. 62).

But as the trial court held in this very case, *Jencks* had no bearing on the question of grand jury minutes. The principles on which petitioners rely are much older than the *Jencks* case. In addition to preservation of a record for possible use by the defense, the recording of a witness' testimony is mandatory, we submit, where there is evidence of his unreliability. In such instances, recording testimony inhibits perjury and insures the availability of a transcript if a perjury prosecution becomes necessary or if, in the interests of justice, the witness' testimony should be disclosed by order of the court. See the cases cited on p. 45 of our earlier brief and *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150.[13]

In our main brief, we have presented to the Court the points which, in our opinion, warrant invocation of

[13] The government also justifies its failure to record by saying that the grand jury testimony of three other witnesses was similarly not recorded (Resp. Br. 55). However, two of these (Forbes and Toyar) did not testify at the trial and the third (Main) is shown by the assignment sheet on p. 87 of the government's brief to have also appeared on January 23, although the Perry affidavit makes no mention of this.

this Court's supervisory powers. These points are as follows:

(1) The prosecution used before the grand jury a witness, Heras, known to be untrustworthy and unreliable;

(2) Despite this knowledge, the prosecution failed to have a reporter transcribe Heras' testimony, although a reporter was regularly present during the grand jury sessions;

(3) The prosecution used Heras as its principal witness at the trial;

(4) At the trial the prosecution represented that Heras' testimony before the grand jury had been transcribed;

(5) The indictment was an attempt to prosecute the petitioners for a local crime for which they had been prosecuted in the state courts;

(6) The indictment was drawn so as to cause the trial of petitioners to be held far from their residences and the scene of their activities, in circumvention of Rule 18 of the Federal Rules of Criminal Procedure.

CONCLUSION

The judgment below should be reversed and this Court should order that the indictment be dismissed or that petitioners' motion for acquittal be granted.

Respectfully submitted,

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